No. 92-1988

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

Supreme Court, U.S.
FILED
JUN 15 1993
OFFICE OF THE CLERK

TICOR TITLE INSURANCE COMPANY, *et al.*,
Petitioners,

v.

WALTER THOMAS BROWN and JEFFREY L. DZIEWIT,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

120 pp

QUESTIONS PRESENTED

1. Whether a federal court may refuse to enforce a prior federal class action judgment, properly certified under Rule 23, on grounds that absent class members have a constitutional due process right to opt out of any class action which asserts monetary claims on their behalf.

2. Whether, for purposes of applying the antitrust state action doctrine, a State's clearly articulated and affirmatively expressed policy must not only permit private conduct but also displace all possibility of economic competition.

3. Whether a federal court in a proceeding under the federal antitrust laws may apply collateral estoppel to findings made in an administrative proceeding by the Federal Trade Commission, despite the statutory prohibition of 15 U.S.C. § 16(a).

4. Whether the applicability of the filed tariff doctrine depends upon the legality of the conduct in issue or the meaningfulness of the regulation.

PARTIES IN THIS PROCEEDING

The respondents in this proceeding are the individuals named as plaintiffs and representatives of the purported class in the complaint filed in this case, and were appellants in the Court of Appeals: Walter Thomas Brown and Jeffrey L. Dziewit.

Pursuant to Rule 29.1, this petition is filed by the six title insurance companies who were named as defendants in the complaint in this case, and who were appellees in the Court of Appeals: Ticor Title Insurance Company, Chicago Title Insurance Company, Security Union Title Insurance Company (formerly known as SAFECO Title Insurance Company), First American Title Insurance Company, Lawyers Title Insurance Corporation, and Stewart Title Guaranty Company. Each of the petitioners is a corporation.

Petitioners *Ticor Title Insurance Company, Chicago Title Insurance Company and Security Union Title Insurance Company* are, directly or indirectly, wholly-owned subsidiaries of Chicago Title and Trust Company, which is a wholly-owned subsidiary of Alleghany Corporation, a publicly-owned corporation. No non-wholly-owned subsidiary of these petitioners has publicly traded common stock.

Petitioner *Lawyers Title Insurance Corporation* is a wholly-owned subsidiary of Lawyers Title Corporation, a publicly-owned corporation. No non-wholly-owned subsidiary of Lawyers Title Insurance Corporation has publicly traded common stock.

Petitioner *First American Title Insurance Company* is a wholly-owned subsidiary of First American Financial Corporation.

Petitioner *Stewart Title Guaranty Company* is a wholly-owned subsidiary of Stewart Information Services Corporation. Non-wholly-owned subsidiaries of Stewart Title Guaranty Company are listed in the Appendix hereto.

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PETITION FOR WRIT OF CERTIORARI

Petitioners pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in *Brown v. Ticor Title Ins. Co.*, No. 91-15474, entered December 28, 1992. Petitioners seek review of the Court of Appeals' adoption and application of a new rule of due process as grounds for refusing to honor a prior federal class action judgment barring the claims asserted in this case. Petitioners also request that this Court correct other errors in the decision of the Court of Appeals.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 982 F.2d 386, and is reprinted in the Appendix at 1a. The unreported decision below of the United States District

Court for the District of Arizona, filed March 5, 1991, is reprinted in the Appendix at 17a.

The decisions approving and affirming the prior class action judgment are: *In re Real Estate Title and Settlement Services Antitrust Litigation*, 1986-1 Trade Cas. (CCH) ¶ 67,149 (E.D. Pa. 1986) (reproduced in the Appendix at 31a), *affirmed without opinion*, 815 F.2d 695 (3d Cir. 1987) (App. 78a), *cert. denied*, 485 U.S. 909 (1988) (App. 79a).

JURISDICTION

The judgment of the Court of Appeals was entered on December 28, 1992. App. 2a. A timely petition for rehearing was denied on March 17, 1993. This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND RULE

The decision of the Court of Appeals refusing to honor the prior class action judgment was based on the due process clause of the Fifth Amendment to the United States Constitution, which states: "No person shall be . . . deprived of life, liberty or property, without due process of law."

The certification and settlement of the prior class action was carried out pursuant to Rule 23 of the Federal Rules of Civil Procedure, which is reproduced in the Appendix at 80a.

STATEMENT OF THE CASE

This petition seeks review of the Court of Appeals' ruling refusing on due process grounds to grant *res judicata* effect to a previously entered class action judgment.

The Prior Judgment. In June 1986 the federal district court in Philadelphia entered its final judgment in the consolidated multidistrict antitrust litigation known as *In re Real Estate Title and Settlement Services Antitrust*

Litigation, MDL No. 633. The judgment settled a series of class action lawsuits against six title insurance companies, the present petitioners, which had sought injunctive relief and damages under the federal antitrust laws by reason of an alleged conspiracy to fix the price of title search and examination and settlement services, carried out through the insurers' participation in state-licensed title insurance rating bureaus in thirteen states. In a lengthy opinion accompanying the final judgment order (App. 31a-77a), the MDL 633 district court described the history of the case, the procedures used in connection with its preliminary approval and hearing on the settlement, the basis for its decision to certify a settlement class, and the grounds for its final approval of the settlement.

Under the terms of the settlement the members of the MDL 633 plaintiff class, who were estimated to number more than 3.4 million (App. 43a), received a package of benefits from the defendant title insurers. In exchange, the class members released their federal and state law claims arising from any allegations that the defendants agreed or conspired to fix the price of title insurance, including title search and examination and/or settlement services. The benefits provided to the class included enhanced title insurance coverage for class members who were current policyholders, reduced rates on newly issued policies for class members who were not current policyholders, and undertakings by the defendants not to engage in the challenged conduct for a specified period. App. 64a-71a. Notice of the proposed settlement was published on two occasions in each of thirty-six newspapers in the thirteen affected states, with aggregate circulation of more than 6 1/4 million. App. 41a n.4. Inquiries and comments were made by hundreds of class members, and the district court conducted a public hearing prior to its final approval. App. 42a-43a.

The district court held that the class could be properly certified under Rule 23(b)(1) and (b)(2), which do not

require an opportunity for class members to opt out of the action. It found that there was "a serious risk that courts in separate actions could impose inconsistent obligations on the defendants" in fashioning injunctive relief with respect to the defendants' rating bureau activities, thus satisfying the requirements of Rule 23(b)(1)(A). App. 48a. It also found that the plaintiffs' challenge was to "activities [by the defendants] which are generally applicable to the proposed class" and for which injunctive relief was appropriate "for the class as a whole," thus satisfying the requirements of Rule 23(b)(2). App. 49a.

The district court declined to order opt-out procedures, holding that the due process rights of class members were "adequately protected by the Rule 23 requirements that the class be adequately represented by the representative plaintiffs and by qualified counsel, that the class receive some adequate form of notice of the proposed settlement and that the court approve the settlement only if it is fair, adequate and reasonable." App. 51a. Ordering opt-out procedures in the case, in the district court's view, would "go against the strong public policy in favor of settlement of class actions," because it would make settlement unlikely and remove any realistic chance for relief for the class members. App. 51a-52a.

An objecting class member appealed the MDL 633 final judgment. The appellant principally asserted that because the settlement resolved monetary damage claims of class members, due process required that opt-out procedures be given, citing this Court's decision in *Phillips Petroleum Co. v. Shutts ("Shutts")*, 472 U.S. 797 (1985).[1] Despite these arguments the Third Circuit affirmed without opin-

[1] Relying on *Shutts*, the dissident class member (the State of Arizona) argued in its appeal in the Third Circuit that "due process requires that absent class members have the right to opt out of a class action settlement that seeks to foreclose their claims for damages." Appellant's Opening Brief at 13, *In re Real Estate Title and Settlement Services Antitrust Litigation* (3d Cir., No. 86-1450, filed Sept. 23, 1986).

ion the final judgment entered by the district court. 815 F.2d 695 (3rd Cir. 1987) (App. 78a). The appellant petitioned for a writ of certiorari to review the affirmance by the Third Circuit, again arguing that opt-out procedures were constitutionally required under *Shutts*.[2] The certiorari petition was denied. *Arizona v. Chicago Title Insurance Co.*, 485 U.S. 909 (1988) (App. 79a).

In the seven years since the MDL 633 final judgment was entered, the defendant title insurers (the present petitioners) have carried out the final judgment according to its terms, providing the specified benefits for the members of the MDL 633 class.

The Proceedings Below. The present case is one of three that have been filed as collateral attacks on the MDL 633 judgment.[3] The complaint was filed in April

[2] The dissenting class member sought review in this Court of the Third Circuit's affirmance by arguing that "*Shutts* clearly holds that if a class action seeks to bind class members concerning their individual claims for damages, due process requires that the class members be provided with an opportunity to opt out. . . . the Third Circuit ignored the *Shutts* holding and refused to permit opt outs in a case in which due process required opt outs." Petition for Writ of Certiorari, *Arizona v. Chicago Title Ins. Co.* (U.S., No. 86-1963, filed June 1987).

[3] At the same time that it was actively pursuing its appeals from the MDL 633 judgment, the State of Arizona filed a state court suit on behalf of Arizona purchasers of title insurance, asserting state antitrust claims against the same defendants arising from the same conduct at issue in MDL 633. The title insurers sought in the MDL 633 court to enjoin the prosecution of this state court suit on *res judicata* grounds, but the Third Circuit held that the res judicata effect of the MDL 633 judgment should be raised as a defense in state court. *In re Real Estate Title & Settlement Services Antitrust Litigation*, 869 F.2d 760 (3d Cir.), *cert. denied* 493 U.S. 821 (1989). The title insurers later sought and obtained dismissal of the state case on *res judicata* and substantive state law grounds; the state court dismissal was affirmed on appeal

1990 in the federal district court in Phoenix, seeking injunctive relief and damages from the same six title insurers who were the defendants in MDL 633. The claims were brought by two individual purchasers from the states of Arizona and Wisconsin (two of the thirteen states at issue in MDL 633) on behalf of an alleged class of purchasers from those states, and asserted that the defendants had conspired to fix the prices for title search and examination services in violation of the federal antitrust laws.

The defendants moved for summary judgment dismissing the plaintiffs' claims as barred under *res judicata* by the MDL 633 final judgment, and the district court granted summary judgment on this ground. App. 28a. The district court noted that the identity of parties and claims required for application of *res judicata* was present. The defendants were the same as in MDL 633, the named plaintiffs were members of the MDL 633 plaintiff class, and the claims asserted were within the scope of the MDL 633 final judgment. App. 26a. The district court rejected the plaintiffs' asserted grounds for refusing to honor the prior judgment: It held that the MDL 633 class members from Arizona and Wisconsin had not been

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on substantive grounds without reaching the *res judicata* issue. *Tucson Unified School Dist. v. Chicago Title Ins. Co.*, 167 Ariz. 114, 804 P.2d 843 (Ariz. App. 1991).

A second state court suit filed in Wisconsin, asserting state antitrust claims on behalf of Wisconsin title insurance purchasers against the MDL 633 defendants and other title insurers, was dismissed in the trial court on *res judicata* and substantive grounds. *Prentice v. Title Ins. Co. of Minnesota*, No. 89-CV-012004 (Circuit Ct., Milwaukee Cty.). The Wisconsin Supreme Court has recently affirmed the trial court's dismissal on substantive grounds without reaching the *res judicata* issue. *Prentice v. Title Ins. Co. of Minnesota*, Nos. 91-0402, 91-1580 (S.Ct. Wisc., Slip Op. filed June 9, 1993).

In both the Arizona and Wisconsin state court cases, the trial courts dismissed the claims on *res judicata* grounds despite arguments that opt-out procedures were constitutionally required in MDL 633 under *Shutts*.

inadequately represented in connection with the settlement (App. 20a-25a); and it found that there had been no failure of due process by reason of the refusal of the MDL 633 court to provide opt-out procedures for class members (App. 26a-28a). As to the latter argument by the plaintiffs, which was based on this Court's *Shutts* decision, the district court held that the MDL 633 judgment was distinguishable from *Shutts* because of the equitable character of the relief afforded by the settlement, and found that the procedures used by the MDL 633 court were sufficient to satisfy due process. App. 27a-28a.

The district court did not address the alternative ground upon which the defendants sought judgment dismissing the plaintiffs' damage claims: that under the filed tariff doctrine,[4] even if an antitrust violation could be proven and injunctive relief obtained, no damages could be recovered by the plaintiffs for having been charged the rates which were "lawful rates" under the states' systems of insurance rate regulation. The district court did address the state action doctrine as a defense to the plaintiffs' claims, even though neither plaintiffs nor defendants had sought judgment on that ground or briefed the issue. App. 28a-30a. The district court stated that even if *res judicata* were not applicable, the plaintiffs' claims would be barred by the state action doctrine, which holds that private conduct undertaken pursuant to state policy and supervision is not subject to federal antitrust liability. *Id.*

On appeal, the Ninth Circuit Court of Appeals, like the district court, noted the identity of parties and claims between the present case and MDL 633, and held that *res judicata* would bar the plaintiffs' claims unless the plaintiffs could demonstrate inadequate representation or a denial of due process. App. 8a. The Court of Appeals

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[4] See *Keogh v. Chicago and N.W. Ry. Co. ("Keogh")*, 260 U.S. 156 (1922); *Square D Co. v. Niagara Frontier Tariff Bureau ("Square D")*, 476 U.S. 409 (1986).

concluded like the district court that the class had been adequately represented in MDL 633. App. 8a-11a.

The Court of Appeals, however, accepted the plaintiffs' argument that the absence of opt-out procedures in MDL 633 was a denial of due process. Its reasoning was based on its characterization of MDL 633 as a "hybrid suit that involved the foreclosure of substantial damage claims," App. 12a, and on its view that opt-out procedures were required in such suits as a matter of law:

> According to *Shutts*, minimal due process requires that "an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court," if monetary claims are involved. 472 U.S. at 812. Because [the present plaintiffs] had no opportunity to opt out of the MDL 633 litigation, we hold there would be a violation of minimal due process if [their] damage claims were held barred by *res judicata*.

App. 12a. The Court of Appeals held that the present plaintiffs were bound by the injunctive relief provided by the MDL 633 settlement and could not seek further injunctive relief in the present suit, but held that their claims for monetary damages were not barred by *res judicata* and could be pursued. *Id.*

The Court of Appeals also addressed the applicability of the state action doctrine and filed tariff doctrine as defenses to the plaintiffs' claims. It held that the state action doctrine did not protect the title insurers' conduct in Arizona because the state title insurance statute there, even though it specifically permitted the title insurers' joint rate filing activity, did not "displace competition with regulation" and therefore did not satisfy the state policy element of the state action test. App. 13a. In Wisconsin, the Court of Appeals held the state action doctrine did not apply because this Court, in its decision last term in a related proceeding against the title insurers by the

Federal Trade Commission,[5] "definitively held" that the active supervision element of the doctrine was not satisfied. App. 14a. The Court of Appeals held that the filed tariff doctrine did not apply to bar the plaintiffs' damage claims because the Arizona and Wisconsin statutes under which the rates were filed and charged did not provide for affirmative governmental approval of the rates in question. App. 14a-16a.

The title insurers' petition for rehearing was denied on March 17, 1993. They now seek review in this Court of the Court of Appeals' ruling reversing the grant of summary judgment in their favor in the district court below.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS DECISION ARTICULATES A NEW CONSTITUTIONAL RULE WITH FUNDAMENTAL IMPLICATIONS FOR THE ADMINISTRATION OF FEDERAL CLASS ACTIONS.

The Ninth Circuit held that the final judgment in MDL 633 could not constitutionally bind respondents (and the classes they represent) with respect to their monetary claims, because the federal court entering the class action judgment in MDL 633 did not afford them the right to opt out of the earlier case. The Ninth Circuit found that the respondents' due process rights were violated, even though the MDL 633 class was properly certified under Rule 23(b)(1) and (b)(2), was adequately represented, and received adequate notice. This holding establishes a novel, far-reaching, and incorrect constitutional rule.

The Ninth Circuit's opinion leaves unclear which of two different due process guarantees it meant to establish, or rely on, in its decision. One reading of the opinion would entitle *all* persons with monetary claims to opt out of a class action because of a fairness-based right to control the litigation of one's own monetary claims. *Cf., e.g.,*

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[5] *FTC v. Ticor Title Ins. Co.*, 112 S.Ct. 2169, 2179 (1992).

Martin v. Wilks, 490 U.S. 755 (1989) (discussing right of individual control). A second possible reading focuses on the due process limits on jurisdiction. *Cf., e.g., Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945). Under this more limited reading, the Ninth Circuit's decision holds that a federal district court's power is restricted to those persons who have minimum contacts with the State (or district) in which the district court sits *or* who consent to jurisdiction by foregoing the opportunity to opt out. Such a reading presumes that respondents and the classes they represent from Arizona and Wisconsin have no minimum contacts with Pennsylvania, or with the Eastern District of Pennsylvania where the MDL 633 court sat. The Ninth Circuit's opinion does not say which of these due process concepts it meant to invoke.

Under either reading, however, review is warranted. The decision would absolutely bar all mandatory federal class actions involving damages, at least in any such case involving class members who reside outside the State or district in which the federal class action court is located. This would result in the elimination of a well-established mechanism for the fair and efficient disposition of class-wide claims. For that reason, the decision conflicts with Rule 23 and precedent in other Circuits. It also rests entirely on a misapplication of language in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), thereby suggesting a need for further clarification by this Court.

Finally, the Ninth Circuit's ruling is wrong. In fact, mandatory multi-state federal court class actions certified under Rule 23(b)(1) and (b)(2) that include damage claims satisfy due process concerns. They provide "fair" process to absent class members because they require procedural protections, particularly adequate representation by the representative plaintiffs. Moreover, they can bind class plaintiffs nationwide because the existence of constitutionally sufficient minimum contacts for federal court jurisdictional purposes is determined by reference to the

United States as a whole rather than any particular State or district.

1. a. The Ninth Circuit's decision creates substantial adverse effects for the application of Rule 23 of the Federal Rules of Civil Procedure, the Multidistrict Litigation Statute, 28 U.S.C. § 1407, and for the fair and efficient adjudication of complex federal court litigation. The decision invalidates the well-established practice of using compulsory class actions to resolve monetary claims in circumstances that satisfy the requirements of Rule 23(b)(1) or (b)(2). As a result, class actions raising essentially identical and interrelated claims will be more difficult to resolve and multiple litigation will increase.

The decision renders Rules 23(b)(1) and (b)(2) unconstitutional in a large class of cases—class actions, or at least multi-state class actions, which include any kind of monetary claim. Rules 23(b)(1) and (b)(2), in pointed contrast to Rule 23(b)(3), do not provide for any right to opt out. Yet the essential function of certifying a class action under those provisions is to give the resulting judgment binding effect on all class members under normal principles of *res judicata*. *See* Rule 23(c)(3) and Advisory Committee's Note to Rule 23, 39 F.R.D. 98, 105 (1966); *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984); 7B CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY K. KANE, FEDERAL PRACTICE & PROCEDURE § 1789 (1986); 3B JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 23.60 at 439-440 (2d ed. 1993). To deny *res judicata* effect to class actions under Rule 23(b)(1) and (b)(2) is thus to invalidate those provisions of the Rule. Such invalidation of a federal Rule is by itself reason enough for this Court's review.

The practical effect of the Ninth Circuit's ruling is to harm both the judicial system and litigants by crippling Rule 23(b)(1) and (b)(2) as tools for the fair and effi-

cient handling of class actions. The drafters of Rule 23 wrote (b)(1) and (b)(2) to provide for mandatory class actions (*i.e.*, without a right to opt out) precisely because the situations they cover are those in which the interests of all class members are intertwined. In such cases, class treatment is based on practical equitable considerations, such as the risk of inconsistent and incompatible relief if multiple injunctive cases were pursued, or the risk that piecemeal assertion of damage claims by multiple plaintiffs may exhaust a limited pool of funds from which the damages could be satisfied.[6]

Cases certified under Rule 23(b)(1) or (b)(2) frequently involve monetary claims as well as claims for injunctive relief, as when back pay is part of an employment discrimination case brought under (b)(2) or, as here, when an antitrust suit challenges both past and future market-wide practices and settles for both prospective and retrospective relief (under (b)(1)(A) and (b)(2)). Mandatory class certification under these provisions has repeatedly been used in multi-state class cases in other circuits where the appropriate equitable circumstances were present, notwithstanding the inclusion of monetary claims. *See, e.g., King v. South Central Bell Tel. & Tel. Co.*, 790 F.2d 524 (6th Cir. 1986) (employment discrimination); *Van Gemert v. Boeing Co.*, 590 F.2d 433 (2d Cir. 1978), *aff'd*, 444 U.S. 472 (1980) (securities case); *Robertson v. National Basketball Ass'n*, 389 F. Supp. 867 (S.D.N.Y. 1975), *aff'd*, 556 F.2d 682 (2d Cir. 1977) (antitrust); *Linquist v. Bowen*, 813 F.2d 884 (8th Cir. 1987) (government benefits unlawfully

[6] Rule 23(b)(1) provides for class certification when separate adjudications would risk inconsistent standards for the defendant (subsection (A)) or would unfairly favor certain plaintiffs over other, similarly situated plaintiffs by, for example, allowing early plaintiffs to deplete a common fund (subsection (B)). Rule 23(b)(2) provides for class certification when the case presents an equitable challenge to the defendant's unitary conduct toward the class as a whole.

withheld); *Wetzel v. Liberty Mutuai Ins. Co.*, 508 F.2d 239, 249, 253 (3d Cir. 1975) (employment discrimination), *cert. denied*, 421 U.S. 1011 (1975). Indeed, this Court has upheld a nationwide (b)(2) class action involving monetary claims for payment of government benefits unlawfully withheld. *Califano v. Yamasaki*, 442 U.S. 682, 701-03 (1979).

The Ninth Circuit's blanket requirement of opt-out rights in any case involving monetary claims would upset this accepted practice and produce the very harm to fair and efficient adjudication that (b)(1) and (b)(2) are designed to address. By allowing class members to opt out, the ruling permits a proliferation of lawsuits on the same issues—exactly what occurred here. Such duplicative litigation burdens both the courts and the litigants and discourages settlement. It also promotes the risk of inequities of different outcomes for plaintiffs and defendants that are inevitable in cases where certification under (b)(1) or (b)(2) is warranted. In short, the Ninth Circuit ruling defeats all of the policies—judicial efficiency, finality, fairness, consistency—long embodied in Rule 23(b)(1) and (b)(2).[7]

The Ninth Circuit's ruling undermines not only Rule 23(b)(1) and (2) but also the multidistrict litigation system established by Congress in 28 U.S.C. § 1407. That

[7] In view of these policies, other circuits and the leading commentators have expressed a *preference* for certifying class actions under (b)(1) or (b)(2) where their standards are met—even if (b)(3), with its opt-out rights, could also be used—explaining that it is a virtue, not a vice, that class members can be bound without any right to opt out. *See, e.g., Kyriazi v. Western Elec. Co.*, 647 F.2d 388, 393 (3d Cir. 1981); *Wetzel v. Liberty Mutual Ins. Co.*, 508 F.2d 239, 249, 253 (3d Cir. 1975), *cert. denied*, 421 U.S. 1011 (1975); *In re A.H. Robins Co.*, 880 F.2d 709, 728 (4th Cir. 1989), *cert. denied*, 493 U.S. 959 (1989); 3B JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 23.31[3] at 236 (2d ed. 1993); 7A CHARLES A. WRIGHT, ARTHUR R. MILLER, & MARY K. KANE, FEDERAL PRACTICE AND PROCEDURE § 1772, at 424-26 (1986).

statute embodies a specific determination by Congress that federal suits presenting common questions should be consolidated in a single federal court, for pretrial purposes, rather than left to proceed in multiple federal courts at the option of the plaintiffs; and the statute has often been used to consolidate class actions initially filed in several districts. *See* HERBERT B. NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 9.13 *et seq.* (3d ed. 1992). The multidistrict system expressly contemplates, moreover, that the court in which the cases are consolidated (the transferee court) may enter final judgment upon settlement, dismissal, summary judgment, or other pre-trial disposition. *See* Rule 14, Rules of Procedure of the Judicial Panel on Multidistrict Litigation; 28 U.S.C. § 1407(f).

The Ninth Circuit's opt-out requirement overrides this congressional policy of compulsory consolidation by permitting out-of-state class members with monetary claims to bring separate, multiple suits. The ruling thus makes unconstitutional what Congress has authorized to occur under 28 U.S.C. § 1407, and what did occur in this case—entry of a final judgment in the transferee court (here, the Eastern District of Pennsylvania) with binding effect on all the parties, including all members of the plaintiff class. The Ninth Circuit's decision, by mandating state-by-state federal class actions, subverts application of the multi-district litigation statute where it is needed most.

b. The Ninth Circuit's decision conflicts with a long line of circuit court decisions specifically rejecting due process challenges to mandatory class actions—multi-state and single state—involving monetary claims certified under Rule 23(b)(1) and (b)(2). *See, e.g., Kincade v. General Tire & Rubber Co.*, 635 F.2d 501, 506 (5th Cir. 1981) (argument "that the settlement agreement violated [class members'] right to due process because it did not provide them a means of opting out . . . is without merit"); *Kyriazi v. Western Electric Co.*, 647 F.2d 388, 393 (3d Cir. 1981) (due process [does] not require receipt of a pre-judgment opportunity to opt out"); *Robertson v. National Basketball Ass'n*, 556 F.2d 682, 686 (2d Cir. 1977) ("preclusion of the opt-out right in (b)(1) settlement does not violate due process").[8] Although these opinions, like the Ninth Circuit here, did not specifically distinguish between a "minimum contacts" due process challenge and a more general "fairness" due process challenge, the Second Circuit has specifically rejected a minimum contacts challenge in a multi-district federal class action case, concluding that "Congress may, consistent with the due process clause, enact legislation authorizing the federal courts to exercise nationwide federal jurisdiction" and that Congress had done so under the multidistrict litigation statute, 28 U.S.C. § 1407. *In re Agent Orange Prod. Liability Litigation*, 818 F.2d 145, 163 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988) (Rule 23(b)(3) class).[9]

The Ninth Circuit ignored settled class-action practices and precedents in reliance on a single line from this

[8] In a pre-*Shutts* decision the Ninth Circuit itself reached a similar result. *Dosier v. Miami Valley Broadcasting Corp.*, 656 F.2d 1295, 1299 (9th Cir. 1981) (due process does not "require the unnamed plaintiffs be given a chance to opt out of Rule 23(b)(2) class actions").

[9] *But cf. In re Real Estate Title and Settlement Services Antitrust Litigation*, 869 F.2d at 766-69 & n.6 (3d Cir.). In the latter decision, the Third Circuit applied reasoning based on *Shutts* to hold that an Arizona state suit collaterally attacking the MDL 633 judgment could not be enjoined by the MDL 633 court in the absence of minimum contacts or a grant of opt-out rights. The Third Circuit expressly limited its decision to the question of whether the state suit could be enjoined, and distinguished the issue of whether the state court plaintiffs were bound by the class action settlement; it noted that the burden of litigating in a distant forum discussed in *Shutts* did not apply to an absent class plaintiff so long as the plaintiff was free to "challenge the adequacy of representation in the forum of its choice." *Id.* at 769.

Court's decision in *Shutts*: "we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." 472 U.S. at 812 (quoted in part at App. 12a). This Court should clarify the confusion created by this seemingly categorical language in *Shutts*;[10] there is no justification for perpetuating such uncertainty with respect to an issue of such obvious practical importance.[11]

c. This case amply demonstrates that, unless the due process rules are clearly established, complex class action

[10] The Ninth Circuit's decision applies this language from *Shutts* categorically to any case involving monetary claims, regardless of the relation of those claims to the case as a whole. However, the *Shutts* decision explicitly qualified the quoted language by noting: "Our holding today is limited to those class actions which seek to bind known plaintiffs concerning claims *wholly or predominately* [sic] *for money judgments.*" 472 U.S. at 811 n.3 (emphasis added). This qualification echoes precisely the traditional Rule 23 distinctions. *See* Advisory Committee's Note to Rule 23, 39 F.R.D. 98, 102 (1966) (Rule 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominately [sic] to money damages"). In certifying the MDL 633 class judgment under (b)(1)(A) and (b)(2), the district court specifically found that the case did not come within that description because in addition to damage claims, it involved substantial injunctive claims and relief—requiring defendants to refrain from certain activities and also affirmatively to provide additional insurance to class-members. *MDL 633*, App. 49a-50a, 56a. The Ninth Circuit did not purport to quarrel with this view, and in fact relied on the characterization of the case as a "hybrid suit" for both injunctive relief and damages. App. 12a.

[11] The Ninth Circuit is not alone in its apparent confusion over the meaning of this language. *See In re A.H. Robins Co.*, 880 F.2d 709, 744-45 (4th Cir. 1989), discussing, *e.g.*, Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions after Phillips Petroleum Co. v. Shutts*, 96 YALE L.J. 1 (1986); Mark C. Weber, *Preclusion and Procedural Due Process in Rule 23(b)(2) Class Actions*, 21 UNIV. OF MICH. J. L. REF. 347 (1988).

litigation can be unravelled many years after completion, thereby unfairly undoing a settlement or judgment that has already been satisfied in good faith by the defendant. In the present case the Ninth Circuit ruling destroys the bargained-for exchange under which a unified resolution of interrelated injunctive and damage claims was achieved seven years ago in the MDL 633 litigation. The question of whether due process permitted the MDL 633 case to be certified without an opt out procedure was directly addressed and resolved by the MDL 633 district court consistent with prevailing law (*MDL 633*, App. 50a-52a), and the class action judgment was affirmed and certiorari was denied despite the assertion by Arizona class members of precisely the same legal argument that was later adopted by the Ninth Circuit in the present case. App. 78a, 79a. In reliance on the finality of the judgment, the defendant title insurers implemented the provisions of the class settlement providing enhanced title insurance coverage and other benefits to a class estimated to number 3.4 million people in thirteen states. See *MDL 633*, App. 38a n.4, 64a-71a.

Apparently, in the Ninth Circuit's view, the MDL 633 class members are permitted to retain and enforce all of the benefits they have received from the class settlement, while each remains free to seek new and potentially duplicative relief. App. 12a (plaintiff is "bound by the injunctive relief provided by the settlement in MDL 633" but may pursue "claims for monetary damages"). The unfairness of that result is patent: petitioners would not have agreed to binding affirmative injunctive relief in the MDL 633 judgment in return for nothing. The Ninth Circuit's decision upsets the settled expectations upon which tangible benefits have been provided to millions of people.[12]

[12] The importance of finality of judgments has led this Court in the criminal procedure area to hold that new constitutional rules that are a "clear break" from the past may not be applied on col-

2. The Ninth Circuit's decision is wrong in respect to both its broader and narrower readings. As to the broader reading, this Court has recently reaffirmed that the normal right of individuals to their own day in court on their own claims does not apply in a properly certified class action under the Federal Rules. *See Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989). It is well-established that the constitutional conditions for a judgment in a class action to bind class members subject to its jurisdiction are adequate notice and adequate class representation—neither one of which was at issue here, because notice was not challenged, and the Ninth Circuit expressly found that the MDL 633 class was adequately represented. App. 8a-12a. *See Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984) ("under elementary principles of prior adjudication a judgment in a properly entertained class action is binding on members in any subsequent litigation"); *Hansberry v. Lee*, 311 U.S. 32 (1940); *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921); Restatement (Second) of Judgments §§ 1, 17, 19, 41(1)(e) (1982). Moreover, even the application of general due process principles, *see, e.g.*,

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lateral attack to invalidate previously entered final judgments, which are to be judged for constitutional sufficiency under the rule in effect at the time the judgment was rendered. *Wright v. West*, 112 S.Ct. 2482 (1992); *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Teague v. Lane*, 489 U.S. 288 (1989); *Griffith v. Kentucky*, 479 U.S. 314 (1987). The Court's decisions in civil cases have not focused on this issue specifically, though the development of the principle in criminal cases has drawn on civil case precedent. *E.g., Teague v. Lane*, 109 S.Ct. at 1074, *citing Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (1940). Justice Souter recently noted the principle that new constitutional rules may not be applied in collateral challenges to final judgments in criminal cases, but remarked that "[n]o such difficulty exists in the civil arena, in which there is little opportunity for collateral attack of final judgments." *James B. Beam Distilling Co. v. Georgia*, 111 S.Ct. 2439, 2446 (1991) (Souter, J.). This is precisely what occurred in the present case, however.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976), plainly supports the validity of the long-established and duly promulgated Rule 23(b)(1) and (b)(2): the fairness, consistency, and efficiency interests served by those provisions amply justify the absence of any opt-out right, given that adequate notice and representation ensure a proper hearing for all arguments and interests.

In fact, the Ninth Circuit opinion rests on a misreading of the Court's statement in *Shutts* which it wrenched out of context. *Shutts* presented no question about any general fairness right of class members with monetary claims to opt out of a class action in order to control litigation of their claims. The issue in that case was one of personal jurisdiction—whether a state court could constitutionally acquire jurisdiction over, and therefore bind, out-of-state class plaintiffs who lack any "minimum contacts" with the State, if class members are afforded an opportunity to opt out of the action. *See Shutts*, 472 U.S. at 806-15. The Court held that affording a right to opt out is constitutionally sufficient because class members who choose not to opt out have adequately consented to the state court's jurisdiction, and consent is an independent basis for personal jurisdiction.[13] The quoted statement relied on by the Ninth Circuit simply explains what is needed to establish consent to jurisdiction—namely, an opportunity not to consent. The statement therefore has nothing to do with, and cannot support, any unqualified due process right of class members to control the litigation of their monetary claims.

Shutts likewise does not support a narrower reading of the Ninth Circuit decision—a holding that, for reasons of

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[13] *See Shutts*, 472 U.S. at 812 ("Any plaintiff may consent to jurisdiction. The essential question, then, is how stringent the requirement for a showing of consent will be. We think that . . . the right to "opt out," [along with adequate notice,] satisfies due process."); *id.* at 814 ("We conclude that the Kansas court properly asserted personal jurisdiction over the absent plaintiffs and their claims against [the defendant].").

territorial power, out-of-State class members with monetary claims have a right to opt out, even in a *federal* court class action like the present case. *Shutts* involved the jurisdiction of a *state* court, so that due process required either minimum contacts with the State or consent to the court's jurisdiction in order for the court to bind a party to its judgment. Taking that bedrock requirement of "contacts or consent" as a given, the Court was concerned only with plaintiff class members "who have no minimum contacts with the forum State" (*Shutts*, 472 U.S. at 811) and who therefore had to give consent (by declining to exercise an opt-out right) in order to be subject to the state court's jurisdiction. That holding has no application in a class action like the present one, brought in *federal* court, because personal jurisdiction does not depend on consent. Here, jurisdiction in the Eastern District of Pennsylvania for all class members was based on the requisite contacts.

Simply put: where the members of the plaintiff class all have "minimum contacts" with the *United States*, that is enough to establish the federal court's personal jurisdiction over the class. The territorial jurisdiction of a court of the United States is no more limited by state boundaries than is the territorial jurisdiction of a state court constitutionally limited by the boundaries of cities, counties, or other subdivisions within a State. Otherwise, the Constitution would prohibit federal courts with multistate jurisdiction, such as the Claims Court, this Court (with its original and appellate jurisdiction), and the circuit courts (which occasionally have exclusive nationwide jurisdiction, *e.g.*, 42 U.S.C. § 7607(b)(1)). That result is not only absurd but contrary to long-established precedent and practice. *See generally* 4 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1067.1 (1987); *United States v. Union Pacific Railroad Co.*, 603-04 (1878).[14]

[14] The Second Circuit has specifically rejected a minimum contacts claim in a multidistrict case, concluding that "Congress may,

The critical distinction between federal and state courts is easy to overlook because of the independent requirement of proper service of process on defendants under Rule 4, Fed. R. Civ. P., which is usually permitted only within the limits set by the state in which the federal court sits. *See* Rule 4(e); *Omni Capital Int'l v. Rudolf Wolff & Co. ("Omni")*, 484 U.S. 97 (1987). Under that Rule, unless a defendant is properly served, jurisdiction that the court could exercise does not attach, and a defendant is generally free to sit back and ignore the proceeding. But Rule 4's service-of-process limits are not relevant here for two reasons. First, they are not a constitutional matter and therefore cannot support a due process limit on the power of the district court for the Eastern District of Pennsylvania authorized under the mutlidistrict litigation statute. *See In re Agent Orange Prod. Liability Litigation*, 818 F.2d at 163. Second, the Rule 4 requirement of service of process has no application to a *plaintiff* class. It is Rule 23 that sets the requirements for notice to members of such a class and the conditions under which the jurisdiction of the court will attach so as to bind class plaintiffs in the proceeding. *See Hansberry v. Lee*, 311 U.S. at 41 (class actions do *not* come within the usual service-of-process rules). The limits on service of process, in short, have no bearing on the constitutional reach of the federal courts' jurisdiction over absent plaintiffs.

The error of the Ninth Circuit's constitutional ruling is particularly clear in a case brought under one of the federal statutes, like the Clayton Act here, 15 U.S.C. § 22, that expressly authorize nationwide service of process. *E.g.*, 15 U.S.C. § 78aa (1934 Securities Exchange Act), 28 U.S.C. § 2361 (Foreign Sovereign Immunities

consistent with the due process clause, enact legislation authorizing the federal courts to exercise nationwide federal jurisdiction" and that Congress had done so under "the multidistrict litigation statute" (28 U.S.C. § 1407). *In re Agent Orange Prod. Liability Litigation*, 818 F.2d 145, 163 (2d Cir. 1987).

Act), 18 U.S.C. § 1965(b) (RICO). *See also* 4 WRIGHT & MILLER, *supra*, § 1067.1, at 311 n.23. In that circumstance, even Rule 4 allows nationwide service. Rule 4(e). In such cases, the courts of appeals have widely held that the constitutional due process requirement is satisfied by the presence of minimum contacts with the United States as a whole, not with any particular State. *See, e.g., Fitzsimmons v. Barton*, 589 F.2d 330 (7th Cir. 1979); *FTC v. Jim Walter Corp.*, 651 F.2d 251 (5th Cir. 1981); *Mariash v. Morrill*, 496 F.2d 1138 (2d Cir. 1974); *see also Go-Video, Inc. v. Akai Elec. Co.*, 885 F.2d 1406 (9th Cir. 1989); *Securities Investor Protection Corp. v. Vigman*, 764 F.2d 1309 (9th Cir. 1985).

What the Ninth Circuit's ruling in this case does is worse than to ignore that line of cases. Instead, it applies a *more* restrictive due process standard to plaintiff class members than would apply to defendants in the same case. That result turns the *Shutts* reasoning on its head, since *Shutts* held that, with respect to personal jurisdiction, absent class plaintiffs are entitled to *less* due process protection than defendants. *See Shutts*, 472 U.S. at 811 ("Because States place fewer burdens upon absent class plaintiffs than they do upon absent defendants in non-class suits, the Due Process Clause need not and does not afford the former as much protection from state-court jurisdiction as it does the latter.")[15] Far from being supported by *Shutts* the ruling below, even if read narrowly, is undermined by *Shutts*.

[15] This Court has long acknowledged congressional power to authorize nationwide service. See 4 WRIGHT & MILLER, *supra*, § 1067.1, at 328 n.74 (citing cases). More recently, however, the Court has expressly declined to address the constitutional issues raised by the theory that a federal court may exercise personal jurisdiction over a federal claim based on the defendant's contacts with the Nation as a whole. *Omni*, 484 U.S. at 102 n.5.

II. THE COURT OF APPEALS DECISION CONTAINS CERTAIN CLEAR ERRORS OF LAW.

In addition to its refusal to apply *res judicata* effect to the final judgment in MDL 633, the Court of Appeals made clear errors of law as to several substantive matters addressed in its decision below. These errors are clear enough to warrant summary reversal even if the petition is not granted as to the first question presented.

A. The Holding Below On The State Action Issue Is Contrary To Federal Statutory Law And Controlling Precedent Of This Court.

Even though no party moved for summary judgment on that basis, the Court of Appeals held that the state action doctrine[16] does not apply to the defendants' participation in state-licensed rating bureaus in Arizona and Wisconsin. App. 12a-14a.[17] The decision of the Court of Appeals on this issue is contrary to precedent of this Court and federal statutory law.

Arizona. The Court of Appeals' state action ruling as to Arizona is based on the first prong of the state action test: the requirement that the challenged conduct be undertaken pursuant to clearly articulated and affirmatively expressed state policy. The Court of Appeals held that

[16] The state action doctrine provides antitrust immunity for state-regulated conduct of private parties where (1) the private conduct is undertaken pursuant to "clearly articulated and affirmatively expressed" state policy, and (2) the private conduct is "actively supervised" by the state. *California Retail Liquor Dealers Ass'n v. Mideal Aluminum*, 445 U.S. 97, 105 (1980).

[17] The action of the Court of Appeals in addressing this issue was inappropriate to its role as a reviewing court. As noted above, the district court's *sua sponte* ruling on this ground was not prompted by the motion of any party, and was made without the development of any legal or factual record. The panel could properly have reversed the district court on this basis, but should not have precluded the parties from developing the record on this issue at the appropriate time.

for a state policy to satisfy the first prong of the state action test, the policy must both authorize the challenged actions and demonstrate an intent by the state legislature to "displace competition with regulation." App. 13a. The Court of Appeals held that the state policy requirement was not satisfied because Arizona did not displace competition with regulation, relying on language from the Arizona title insurance statutes (A.R.S. § 20-341) stating that the statutes were not "intended to prohibit or discourage reasonable competition." *Id.*

The Court of Appeals' ruling is contrary to precedent of this Court which holds that a state regulatory policy need not eliminate all possibility of competition in order to satisfy the state action doctrine. In *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48, 59-60 (1985), this Court held that a state policy that permitted but did not compel participation by regulated parties in rating bureaus satisfied the state policy prong of state action analysis. Such a regulatory approach, according to this Court, was a legitimate state policy which balanced "the efficiency of collective ratemaking and the competition fostered by individual [rate] submissions." *Id.* at 59. As this language makes clear, the presence of some elements of competition in the regulatory policy did not disqualify it under the state action doctrine.

The Arizona statutes specifically authorize collective ratemaking by title insurance rating bureaus as part of the state's "extensive" program of regulation over title insurance rates. *Tucson Unified School Dist. v. Chicago Title Ins. Co.*, 167 Ariz. 114, 115, 804 P.2d 843, 844 (App. 1991). The Court of Appeals' view that Arizona's state policy is nonetheless insufficient under the state action doctrine because it does not expressly discourage or prohibit competition under the regulatory structure clearly conflicts with this Court's holding in *Southern Motor Carriers.*

Wisconsin. The panel based its ruling on state action in Wisconsin solely on a *sua sponte* fact finding concern-

ing the second prong of the state action test: the requirement that the conduct in issue be actively supervised by the state. No factual record was made in the district court or presented to the Court of Appeals concerning this issue. The Court of Appeals nonetheless ruled that active supervision was lacking because a decision by this Court last term upheld a related Federal Trade Commission decision that "there was no active supervision in Wisconsin." App. 14a.[18]

The Court of Appeals' ruling on this issue violates federal statutory law. Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), explicitly directs that "in any action or proceeding brought under the antitrust laws, collateral estoppel effect shall *not* be given to any finding made by the Federal Trade Commission" (emphasis added).[19] This Congressional directive is neither odd nor academic, but reflects a legislative determination that in a private antitrust suit defendants should not have liability imposed on them without the evidence first being tested through the discovery, evidentiary and trial procedures applicable in the federal courts. The Court of Appeals' ruling denies the defendants their statutory right to have the allegations against them determined on the basis of a fact record developed according to judicial procedures, rather than by applying collateral estoppel to findings from an FTC administrative proceeding.

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[18] *FTC v. Ticor Title Ins. Co.*, 112 S.Ct. 2169 (1992). That decision involved a review of an FTC decision against five of the six present petitioners. *In the Matter of Ticor Title Ins. Co., et al.*, Docket No. 9190 (FTC Final Order, Sept. 19, 1989). The case is now on remand in the Third Circuit to address further issues.

[19] On review of an FTC decision, of course, no independent fact findings are made by the reviewing courts, which merely assess whether there is any substantial evidence to support the agency's findings below. *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 455 (1986).

B. The Holding Below On The Filed Tariff Doctrine Is Contrary To Controlling Precedent Of This Court.

The Court of Appeals rejected the application of the filed tariff doctrine of *Keogh v. Chicago and N.W. Railway Co. ("Keogh")*, 260 U.S. 156 (1922), as a bar to plaintiffs' damages claims, on grounds that defendants' rates "were the product of unlawful activity" and "were not subjected to meaningful review by the state." App. 15a-16a. This reasoning is contrary to precedent of this Court.[20]

The Court of Appeals' assertion that the *Keogh* doctrine does not apply to rates which were the product of "unlawful activity" fundamentally misapprehends the doctrine. As this Court made clear in *Keogh* itself, the filed tariff doctrine is not a doctrine of antitrust immunity; it presumes that the rates in question were the result of an antitrust violation and may be subject to governmental actions for either criminal or civil injunctive relief. 260 U.S. at 161-162. The doctrine nonetheless precludes antitrust plaintiffs from recovering damages for having been charged rates which were lawfully filed and effective under a statutory system of regulation. *Id.*[21]

The Court of Appeals' insistence on "meaningful review" is also erroneous. In *Square D Co. v. Niagara Frontier Tariff Bureau ("Square D")*, 476 U.S. 409

[20] The panel's reasoning is also incorrect insofar as it is based on factual conclusions concerning the lawfulness of the defendants' conduct and the extent of state review that have no basis in the record in the district court.

[21] The Ninth Circuit's ruling on this issue also conflicts, for example, with the decision of the Seventh Circuit in *Minsky v. Auto Driveaway Co.*, 1985-1 Trade Cas. (CCH) ¶ 66,477 (7th Cir.), *cert. denied*, 469 U.S. 1019 (1984), holding that the *Keogh* doctrine barred recovery of antitrust damages with respect to filed rates, even though the defendant carriers had been convicted of a criminal violation in the setting of the filed rates and the rates themselves had become effective "without any affirmative action on the part of the ICC." 1985-1 Trade Cas. at 65,405.

(1986), this Court held that the filed tariff doctrine is applicable even where the rates in question were filed with, but not investigated or approved by, the relevant regulatory authority. The appellate decision under review in that case noted that the defendants had engaged "in conduct that either was not or could not be approved" by the regulator, and they colluded in the "joint setting of rates and related policies," despite their failure to obtain authorization or approval to engage in joint rate-making. *Square D Co. v. Niagara Frontier Tariff Bureau*, 760 F.2d 1347, 1350 (2d Cir. 1985). The rates established in the filed tariffs had never been the subject of a prior regulatory approval process, but had been "allowed to go into effect" under the regulatory scheme without any prior hearing, challenge or regulatory action of any sort. *Square D*, 476 U.S. at 417. Despite this lack of prior regulatory action, this Court held that the defendants' rates "were, however, duly submitted, lawful rates . . . in the same sense that the rates filed in *Keogh* were lawful. Under the Court's holding in that case, it therefore follows that petitioners may not bring a treble-damages antitrust action." *Id.*

The reasoning by which the Court of Appeals rejected application of the *Keogh* doctrine is therefore contrary to precedent of this Court.[22]

[22] The Ninth Circuit's ruling also conflicts with the recent decision of the Wisconsin Supreme Court in another of the cases collaterally attacking the MDL 633 judgment. *Prentice v. Title Ins. Co. of Minnesota*, Nos. 91-0402, 91-1580 (S.Ct. Wisc., Slip Op. filed June 9, 1993). In that decision, the Wisconsin Supreme Court ruled that state law antitrust damage claims could not be pursued against the present petitioners and others on the basis of the conduct at issue in MDL 633 and the present case, because such claims "would undermine the [Wisconsin] regulatory scheme by allowing courts to award damages based on a rate which was never filed with the Insurance Commissioner" in violation of the *Keogh* doctrine. Slip Op. at 10. The State Supreme Court specifically rejected arguments that damage claims should be permitted because of the alleged illegality of the defendants' conduct and the

CONCLUSION

The Court should grant the writ of certiorari to review the refusal by the Court of Appeals to grant *res judicata* effect to the class action judgment in MDL 633. The Court should also correct the plain legal errors made by the Court of Appeals by summary reversal, even if review is not granted as to the first question.

Respectfully submitted,

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alleged lack of regulatory supervision by state officials. Slip Op. at 11, 12.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-15474

D.C. No. CV-90-0577-PHX-SM

WALTER THOMAS BROWN, on behalf of themselves and all others similarly situated; JEFFREY L. DZIEWIT, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellants,

v.

TICOR TITLE INSURANCE COMPANY, a California corporation; CHICAGO TITLE INSURANCE COMPANY, a Missouri corporation; SECURITY UNION TITLE INSURANCE CO., as successor in interest to SAFECO Title Insurance Company, a California corporation; FIRST AMERICAN TITLE INSURANCE COMPANY, a corporation; LAWYERS TITLE INSURANCE CORPORATION, a Virginia corporation; STEWART TITLE GUARANTY COMPANY, a Texas corporation,
Defendants-Appellees.

[982 F.2d 386 (9th Cir. 1992)]

Appeal from the United States District Court
for the District of Arizona
Stephen M. McNamee, District Judge, Presiding

Argued and Submitted
April 16, 1992, San Francisco, California
Filed December 28, 1992

Before: Procter Hug, Jr., Thomas Tang, and Thomas G. Nelson, Circuit Judges

Opinion by Judge T.G. Nelson

COUNSEL

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Paul J. Laveroni, Cooley, Godward, Castro, Huddleston & Tatum, San Francisco, California; John C. Christie, Jr., Bell, Boyd & Lloyd, Washington, D.C. for the defendants-appellees.

OPINION

T.G. NELSON, Circuit Judge:

Appellants Brown and Dziewit (hereinafter "Brown") are representatives of the Arizona and Wisconsin classes of consumers of title insurance. After the approval of a settlement agreement in a class action in Pennsylvania involving the same parties, Brown filed the present action in the district court of Arizona alleging a conspiracy to fix price levels for title search and examination services. Brown sought relief from the district court in the form of (1) treble damages, (2) costs and attorney fees, and (3) judgment restraining and enjoining the appellees from engaging in unlawful conduct. The appellees, title insurance companies (hereinafter "Ticor"), filed a motion for summary judgment, based on *res judicata*, which the district court granted. We affirm the district court in part in

holding that *res judicata* bars injunctive relief, and reverse and remand on all other issues.

RELATED CASES

In 1985, following enforcement proceedings initiated by the Federal Trade Commission ("FTC"), twelve separate class action lawsuits were filed in five federal district courts in four states. The complaints alleged price fixing by various title insurance companies, encompassing the defendants in the present case, in thirteen affected states, including Arizona and Wisconsin. The class actions were consolidated as MDL 633 in the Eastern District of Pennsylvania by the Judicial Panel on Multidistrict Litigation pursuant to 28 U.S.C. § 1407. *In re Real Estate Title and Settlement Servs. Antitrust Litig.*, 1986-1 Trade Cas. (CCH) ¶ 67,149 (E.D. Pa. 1986), *aff'd without opinion*, 815 F.2d 695 (3d Cir. 1987), *cert. denied*, 485 U.S. 909 (1988). The complaints alleged that Ticor had violated the antitrust laws by participating in state-licensed rating bureaus which filed collective rates for real estate title search and examination services with state insurance regulatory bodies.

The district court in MDL 633 found that under *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985), Ticor could establish at least the first part of the two-part test for a state action immunity defense. *See In re Real Estate*, 1986-1 Trade Cas. (CCH) ¶67,149, at 62,923.[1] Before the court could decide the second part of the test, however, the parties

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[1] The state action immunity doctrine protects private price-fixing if "the challenged restraint [is] one clearly articulated and affirmatively expressed as state policy [and] the policy [is] actively supervised by the State itself." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (quotations omitted) (hereafter, *"Midcal"*). The *Southern Motor Carriers* decision extended the state action immunity doctrine to situations where collective rate making was permitted but not compelled by state law. 471 U.S. at 61.

reached a settlement in which the monetary claims against Ticor were dropped. The settlement was accepted by the MDL 633 court in its written decision dated June 10, 1986. *Id.* at 62,937.

The Arizona attorney general then filed a new complaint in Arizona state court on behalf of state school districts seeking damages from the same defendants under state law. The MDL 633 court granted an injunction against the state court suit. The injunction was vacated by the Third Circuit, which held that the MDL 633 settlement could be collaterally attacked. *In re Real Estate and Settlement Servs. Antitrust Litig.*, 869 F.2d 760, 769 (3d Cir.), *cert. denied*, 493 U.S. 821 (1989). The court held that if a class member had "not been given the opportunity to opt out in a class action involving both important injunctive relief and damage claims," then the class member must have either "minimum contacts with the forum or consent to jurisdiction in order to be enjoined by the district court that entertained the class action." *Id.* The court found that the class members in the MDL 633 case were not afforded the opportunity to opt out and did not have minimum contacts or consent to jurisdiction. The Arizona state court action was therefore allowed to proceed in part to decide if the plaintiffs were afforded due process in the MDL 633 action.

The Arizona state court dismissed the complaint. The Arizona Court of Appeals affirmed the dismissal, holding that Arizona's title insurance statutes authorized the "insurers to cooperate in rate-making in the issuance of title insurance policies," and therefore the activity was not within the purview of the Arizona antitrust laws. *Tucson Unified Sch. Dist. v. Chicago Title Ins. Co.*, 804 P.2d 843, 845 (Ariz. Ct. App. 1991).

In 1986, an Administrative Law Judge entered an initial decision in the FTC's enforcement action against various title insurance companies, including the defendants in this action, for price fixing in real estate title and search

services. *In re Ticor Title Ins. Co.*, Docket No. 9190, FTC Initial Decision of Administrative Law Judge (December 22, 1986). In its final order, the FTC found that the defendants' activities in Wisconsin and Arizona were not beyond the federal antitrust laws and that the state action immunity defense did not apply to defendants' activities in Wisconsin and Arizona because there was no active supervision by these states. *In re Ticor Title Ins. Co.*, Docket No. 9190, FTC Final Order (September 19, 1989).

The defendants petitioned the Third Circuit for review of the final order of the FTC in 1991. *Ticor Title Ins. Co. v. Federal Trade Comm'n*, 922 F.2d 1122 (3d Cir. 1991). The Third Circuit held that the defendants' "collective rate setting for title search and examination services in these six states [including Arizona and Wisconsin] [was] immune from federal antitrust liability under the state action doctrine," thereby rejecting the FTC's findings which rejected the state action immunity defense as to Arizona and Wisconsin. 922 F.2d at 1125-26. The court held that the state action immunity defense did not depend upon the quality of supervision, so long as "the state clearly articulates and actively supervises the [anticompetitive] policy." Id. at 1140. The Third Circuit therefore vacated the FTC's final order. Id. The FTC appealed the decision to the United States Supreme Court which reversed and remanded the Third Circuit's decision. *Federal Trade Comm'n v. Ticor Title Ins Co.*, 504 U.S. —, 112 S. Ct. 2169, 119 L. Ed. 2d 410 (1992).

The Supreme Court held that the "mere potential for state supervision [was] not an adequate substitute for a decision by the State," and therefore concluded that the Wisconsin statute did not provide immunity from antitrust liability. *Id.* at —, 112 S. Ct. at 2179, 119 L. Ed. 2d at 425. The Supreme Court remanded the case for further proceedings as to the quality of state supervision under the regulatory scheme in Arizona.

FACTS AND PROCEDURAL HISTORY

In 1985, the MDL 633 class action claims were filed in Pennsylvania. In January, 1986, a settlement was reached and presented to the MDL 633 court. The settlement dropped the monetary claims against Ticor and provided for (1) an injunction against Ticor's participation in rating bureaus for a specified time period in five states, including Arizona and Wisconsin, (2) an increased dollar amount of each title insurance policy issued to class members in all thirteen states during the class period, (3) additional coverage for new title insurance policies purchased by class members, and (4) payment of the costs of lawsuit and attorneys' fees as approved by the MDL 633 court.

The MDL 633 court certified the class under Federal Rules of Civil Procedure 23(b)(1) and (b)(2)[2] and

[2] A class may be certified if it meets the requirements of Fed. R. Civ. P. 23(a):

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

The court found the necessary elements present.

Federal Rules of Civil Procedure 23 provides that a class action may be maintained if subdivision (a) is satisfied and, in addition, the prosecution of separate actions would create a risk of

> [23(b)(1)](A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or . . . [23(b)](2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . . .

Fed. R. Civ. Proc. 23(b)(1)(A), (b)(2).

accepted the settlement. In doing so, the court considered and rejected objections to the settlement, including an attempt by the Arizona attorney general to opt out of the class. The court deemed these objections and requests to have been made on behalf of the states represented by the various attorneys general, and not on behalf of individual class members. *See In re Real Estate,* 1986-1 Trade Cas. (CCH) ¶ 67,149, at 62,926 n.5.

Brown filed the present action in the Arizona district court on behalf of Arizona and Wisconsin title insurance consumers alleging a combination and conspiracy by Ticor to fix, maintain and stabilize rates in Arizona and Wisconsin for title search and examination services in violation of the federal antitrust laws, codified at 15 U.S.C. § 1, *et seq.* (the Sherman Act). Ticor moved for summary judgment dismissing the action based on *res judicata,* claiming that Brown, as a party to the MDL 633 settlement, was bound by the settlement. Relying on *res judicata* as well as state action immunity, the district court granted Ticor's summary judgment motion. The district court had jurisdiction pursuant to 28 U.S.C. §§ 1332 and 1337, and we have jurisdiction of Brown's timely appeal pursuant to 28 U.S.C. § 1291.

STANDARD OF REVIEW

This court reviews a grant of summary judgment under a *de novo* standard. *In re Bullion Reserve of N. Am.,* 922 F.2d 544, 546 (9th Cir. 1991). If, viewing the record in the light most favorable to the nonmoving party, there are no genuine issues of fact and the moving party is entitled to judgment as a matter of law, the judgment will be affirmed. *Norfolk Energy, Inc. v. Hodel,* 898 F.2d 1435, 1439 (9th Cir. 1990).

I.

RES JUDICATA

Ticor contends that Brown was a member of the MDL 633 settlement class and was thus barred from relitigating the case in Arizona by *res judicata*. A lawsuit involving the same parties and based upon the same cause of action as asserted in a previous case is barred under the doctrine of *res judicata*. *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326 n.5 (1979). However, if the plaintiff was not adequately represented in the prior action or there was a denial of due process, then the prior decision has no preclusive effect. *Hansberry v. Lee*, 311 U.S. 32 (1940).

Admittedly, Brown was a member of the plaintiff class in the prior MDL 633 litigation and the same cause of action is involved. Thus, the issue is whether Brown falls within one of the two exceptions to the *res judicata* doctrine.

A. *INADEQUATE REPRESENTATION*

Brown contends that he was not adequately represented in the MDL 633 litigation, thereby rendering *res judicata* inapplicable to the present lawsuit, and that the district court therefore improperly granted Ticor's motion for summary judgment. To support his argument, Brown cites *Gonzales v. Cassidy*, 474 F.2d 67 (5th Cir. 1973). Brown contends that the Gonzales class representative was found to have inadequately represented all class members when the representative failed to take an appeal that "could not be characterized as patently meritless or frivolous." *Id.* at 76. The failure to prosecute an appeal deprived the class members, whose rights were not vindicated by the district court's decision, of full participation in the process. *Id.*

We hold that *Gonzales* is not applicable to the present situation. In *Gonzales*, the class members collaterally

attacked the settlement, demonstrating that the class representative secured a better monetary deal for himself than the rest of the class, and it was because of this that he failed to pursue an appeal on behalf of the class. *Id.* at 74-76. In the MDL 633 litigation, the settlement was similar for each class member.

Adequate representation as required by Federal Rules of Civil Procedure Rule 23(a)(4) "depends on the qualifications of counsel for the representatives, an absence of antagonism, a sharing of interests between representatives and absentees, and the unlikelihood that the suit is collusive." *In re N. Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 855 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983). On collateral attack of a judgment, however, we will not second-guess a prior decision that counsel adequately represented a class. Instead, to avoid the binding effect of a prior class action based on class counsel's error, a party must show not only that the prior representative " 'failed to prosecute or defend the action with due diligence and reasonable prudence,' " but also that " 'the opposing party was on notice of facts making that failure apparent.' " *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1278 (9th Cir.) (quoting *Restatement (Second) of Judgments* § 42 (1)(2) (1982)), *cert. denied*, 113 S. Ct. 408 (1992). Brown fails to present facts which indicate a lack of adequate representation.

1. *ARIZONA*

In arguing specifically for the Arizona class, Brown contends that counsel's failure to assert a 1981 Arizona case, *United States v. Title Ins. Rating Bureau, Inc.*, 517 F. Supp. 1053 (D. Ariz. 1981), *aff'd*, 700 F.2d 1247 (9th Cir. 1983), *cert. denied*, 467 U.S. 1240 (1984) ("*TIRBA*"), to the district court in the MDL 633 litigation established the inadequacy of representation of the Arizona class. The district court in *TIRBA* had held that the state action immunity defense was unavailable to

Ticor because the Arizona legislature intended to promote competition, not to replace competition with regulation.[8] *Id.* at 1059.

We hold that the failure of class counsel to specifically assert *TIRBA* was harmless error. The MDL 633 court referred to the case in its memorandum decision. *In re Real Estate,* 1986-1 Trade Cas. (CCH) ¶ 67,149, at 62,933. The case was known to the court, and the Arizona class was therefore not harmed by class counsel's failure to directly bring the case to the court's attention.

Brown also argues that, because MDL class counsel misinterpreted *Southern Motor Carriers* as providing Ticor with the first half of a state action immunity defense for activities in Arizona, the Arizona class should not be bound by the MDL 633 decision. We disagree. The import of *Southern Motor Carriers* was fully considered in the MDL 633 lawsuit. *See In re Real Estate,* 1986-1 Trade Cas. (CCH) ¶ 67,149, at 62,922-23. The Pennsylvania district court made clear its steadfast belief that Arizona and the other affected states permitted Ticor's allegedly anticompetitive activities. *Id.* at 62,923. The court therefore indicated that under *Southern Motor Carriers* Ticor could establish the first half of a state action defense. *See id.* at 62,922-23.

Even if class counsel might have challenged this ruling, it was an equally acceptable tactic to forego such a challenge and, instead, to attack the second half of Ticor's state action defense. This is especially true in view of the strength with which the MDL 633 court apparently held its view of *Southern Motor Carriers.* In pursuing this alternate course, class counsel undertook extensive discovery to determine whether Arizona and the other states actively supervised the alleged anticompetitive activity. *See id.* at 62,923. Under the circumstances, we conclude

[8] The state action immunity defense will be discussed more fully in Section II, *infra.*

that MDL 633 class counsel was not derelict in its duties owed to the class. Brown's argument here therefore fails to free the Arizona class from the binding effect of the MDL 633 judgment.

2. *WISCONSIN*

Brown asserts that the MDL 633 class counsel's failure to raise the "clear legislative intent of the Wisconsin statutory scheme" constituted inadequate representation of the Wisconsin class, and therefore *res judicata* should not preclude the lawsuit by the Wisconsin class. Brown contends that the Wisconsin statute "was clearly designed to promote competition," and this "design" should have been asserted by the MDL 633 class counsel. The failure to do so, according to Brown, amounted to inadequate representation of the Wisconsin class.

We hold there was no inadequate representation of the Wisconsin class. The Wisconsin statute stated that its purpose was to regulate the business of insurance in a manner that would preclude the application of federal antitrust laws. Wis. Stat. § 625.01(2)(f). This indicates an intent to replace competition with regulation and the failure to assert a legislative intent to the contrary was not inadequate representation.

B. *DUE PROCESS VIOLATION*

Brown also argues that minimal procedural due process must be provided in a class action lawsuit in order "to bind known plaintiffs concerning claims wholly or predominately" for monetary damages. *See Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 811 n.3 (1985). Brown asserts that certifying the MDL 633 class pursuant to Federal Rules of Civil Procedure 23(b)(1) and (b)(2), which do not provide for the right to opt out, would be a violation of minimum due process if the class judgment precluded future recovery of damages, and therefore *res judicata* is not applicable to his case.

In order to bind an absent plaintiff concerning a claim for monetary damages, the court must provide minimal due process. *Id.* at 811-12. *Shutts* is limited to claims "wholly or predominately for money judgments." *Id.* at 811 n.3. The Third Circuit held that the MDL 633 litigation was a "hybrid suit that involved the *foreclosure of substantial damage claims.*" *In re Real Estate,* 869 F.2d at 768 (emphasis added). We follow the Third Circuit's holding.

According to *Shutts,* minimal due process requires that "an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court," if monetary claims are involved. 472 U.S. at 812. Because Brown had no opportunity to opt out of the MDL 633 litigation, we hold there would be a violation of minimal due process if Brown's damage claims were held barred by *res judicata.* Brown will be bound by the injunctive relief provided by the settlement in MDL 633, and foreclosed from seeking other or further injunctive relief in this case, but *res judicata* will not bar Brown's claims for monetary damages against Ticor.

II.

STATE ACTION IMMUNITY DEFENSE

The United States Supreme Court in *Midcal* established two requirements for antitrust immunity under *Parker v. Brown,* 317 U.S. 341 (1943): (1) the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy;" and (2) the policy must be "actively supervised" by the state. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum,* 445 U.S. 97, 105 (1980). *Southern Motor Carriers* extended the state action doctrine to situations where collective rate making conduct was permitted but not compelled by state law. *Southern Motor Carriers,* 471 U.S. at 61.

In *Traweek v. City and County of San Francisco,* 920 F.2d 589 (9th Cir. 1990), we stated a two part test to determine the existence of a "clearly articulated" state policy under the first prong of *Midcal.* The court must determine (1) whether the legislature authorized the challenged actions and, if so, (2) whether the legislature intended to displace competition with regulation. *Traweek,* 920 F.2d at 591-92. Although the Third Circuit has not addressed the issue of whether Wisconsin or Arizona passed the first prong of the Midcal test, see *Ticor,* 922 F.2d at 1135, we do so here because of the additional two part test set forth in *Traweek* which is required to satisfy the first prong of the *Midcal* test.

A. *ARIZONA*

In *Tucson,* the Arizona court found "rate-making by title insurance bureaus [was] specifically authorized by Arizona law," but made no determinations regarding the legislative intent to replace competition with regulation. 804 P.2d at 844.

Brown argues Arizona's legislative intent was to enhance competition, not replace it, thereby failing to meet the "clearly articulated" standard of *Midcal.* To meet the "clearly articulated" standard, Arizona must meet *Traweek*'s two part test. Arizona Revised Statute § 20-341 states that "nothing in this article is intended to prohibit or discourage reasonable competition." Based on this language and the lack of anything in the statute or legislative history to show a contrary intent, we hold the Arizona statute does not meet part two of the *Traweek* test which requires a showing of legislative intent to displace competition with regulation, and thus fails the first prong of the *Midcal* test. The state action immunity defense, therefore, will not protect Ticor from the lawsuit by the Arizona class.

B. *WISCONSIN*

Brown also contends that Wisconsin's statute does not show a clear legislative intent to replace competition with regulation, and therefore does not meet the *Traweek* test regarding "clear articulation."

Because the recent United States Supreme Court decision definitively held that there was no active supervision in Wisconsin, *Federal Trade Comm'n v. Ticor Title Ins. Co.*, 504 U.S. at —, 112 S. Ct. at 2179, 119 L. Ed. 2d at 425, we need not address Brown's argument concerning the first prong of the *Midcal* test. Wisconsin does not meet the second prong of *Midcal*, and thus the state action immunity defense will not protect Ticor from the lawsuit by the Wisconsin class.

III.

FILED TARIFF DOCTRINE

The Filed Tariff Doctrine, also known as the *Keogh* doctrine, emanates from *Keogh v. Chicago & N. W. Ry.*, 260 U.S. 156 (1922). In *Keogh*, a private shipper claimed that rates submitted to and approved by the Interstate Commerce Commission (ICC) under the Interstate Commerce Act (ICA) were the product of an antitrust violation. The Court found no violation where the rates were submitted to and approved by the ICC.

Brown contends that the present case involves state regulatory schemes which differ from the type of regulation in *Keogh*. The Arizona and Wisconsin statutes do not provide for affirmative governmental approval, as did the ICA. The *Keogh* doctrine therefore should not apply to the present case, according to Brown.

Ticor argues that the Arizona statutes regulate the title insurance business and that there are specific regulatory standards for title insurance rates established by Arizona law, and therefore those are legal rates under *Keogh*. In addition, according to Ticor, the Wisconsin law is clear that rates filed with the Commissioner of Insurance are legal rates under *Keogh*. Ticor contends the rates filed in Arizona and Wisconsin are legal rates and are thus protected from antitrust claims under *Keogh*.

In *Wileman Bros. & Elliott, Inc. v. Giannini*, 909 F.2d 332 (9th Cir. 1990), nectarine and plum producers served either as members of administrative committees appointed by the federal Secretary of Agriculture or as employees of such committees which would issue and enforce standards for marketing nectarines and plums. The standards set forth by the committees allegedly favored the growers who were a part of the committees. The committee members promulgated the regulations themselves rather than making recommendations to the Secretary. *Id.* at 337. The defendants in *Wileman* contended that the Secretary "tacitly approved" the standards by failing to disapprove them as provided for in the regulations and that therefore *Keogh* should apply. *Id.* We held that:

> [G]overnmental approval [in *Keogh*] was required before there could be any effect from the collective activity and it was such approval that legitimized the allotments and the rates.
>
> . . . The *mere fact of failure to disapprove*, however, does *not legitimize otherwise anticompetitive conduct* . . . [Nondisapproval] does not guarantee any level of review whatsoever. . . . There is no affirmative process of non-disapproval which can be relied upon fairly to evaluate a committee's regulations. Second, non-disapproval is equally consistent with lack of knowledge or neglect as it is with assent.

Wileman, 909 F.2d at 337-38 (emphasis added).

In the present case, Ticor makes much of the fact that the filed rates are the only rates which it may legally charge in Arizona and Wisconsin. However, if those rates were the product of unlawful activity prior to their being

filed and were not subjected to meaningful review by the state, then the fact that they were filed does not render them immune from challenge. The absence of meaningful state review allows the insurers to file any rates they want. Therefore, the act of filing does not legitimize a rate arrived at by improper action.

The regulations of Arizona and Wisconsin require only "non-disapproval" of the rates and no not require compliance with strict guidelines such as those set forth under the ICC regulations. This case falls within the holding of *Wileman*, and we therefore hold the filed tariff doctrine is not applicable under either the Arizona or Wisconsin regulatory schemes.

IV.

CONCLUSION

The decision of the district court is hereby AFFIRMED IN PART in its holding that res judicata bars injunctive relief, and REVERSED IN PART and REMANDED for further proceedings on all other issues. Costs to Appellants.

[Stamped: Filed March 5, 1991]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CIV 90-0577-PHX-SMM

WALTER THOMAS BROWN, *et al.*,
Plaintiffs,

v.

TICOR TITLE INSURANCE CO., *et al.*,
Defendants.

MEMORANDUM AND ORDER

On September 14, 1990 Defendants filed a Motion for Summary Judgment, alleging that Plaintiffs' claims are barred under *res judicata* and the Filed-Tariff Doctrine. Plaintiffs timely responded and oral argument was heard on January 7, 1990.

I. BACKGROUND

Plaintiffs filed a class action complaint against Defendants for violation of the federal antitrust laws codified at 15 U.S.C. § 1 (the "Sherman Act"). Section one of the Sherman Act proscribes "any contract, combination or conspiracy" that unreasonably restrains the nation's domestic or foreign commerce. 15 U.S.C. § 1. Plaintiffs allege that Defendants "entered into a contract, combination or conspiracy" to fix price levels for title searches and examinations. (Complaint p. 7). Plaintiffs pray for relief in the form of (1) treble damages and, (2) restraining and enjoining Defendants from engaging in further unlawful conduct under 15 U.S.C. § 1. (Complaint p. 10).

The undisputed facts are as follows:

Each of the Defendants sell title insurance in the states of Arizona and Wisconsin. Plaintiffs allege that the "Defendants entered into a contract, combination or conspiracy to fix, stabilize and maintain at agreed-upon prices levels charges for title search and examination services," commencing "at some time prior to 1981."

These same Defendants were part of a prior settlement judgement involving similar claims. *See In re Real Estate Title and Settlement Serv, Antitrust Litig.*, 1986-1 Trade Cas. (CCH) ¶ 67,149 (E.D. Pa. 1986), *aff'd without opinion*, 815 F.2d 695 (3rd Cir. 1987), *cert. denied*, 108 S. Ct. 1085 (1988) (hereinafter "MDL 633"). The Final Order in MDL 633 dismissed with prejudice:

> [A]ll claims . . . as against defendants, their respective parents, subsidiaries, agents, officers, directors and employees, arising under the laws of the United States or of any State or other jurisdiction that are based on, relate to or arise out of any allegations that any of them agreed or conspired to fix, raise, maintain, stabilize, or otherwise affect the process of title insurance, including title search and examination and/or settlement services.

The class certified in MDL 633 consisted of:

> All Purchasers and insureds who purchased or received title insurance, including search and examination and/or settlement services, from any title insurance underwriter (whether or not a defendant herein) or any agent or such underwriter with respect to real estate located in any of the thirteen Affected States [including Arizona and Wisconsin] during the period from January 1, 1981 to December 31, 1985 inclusive.

Plaintiff Walter Thomas Brown, an Arizona citizen, claims that he purchased title search and examination

services from one of the Defendants on or about August 10, 1983. Plaintiff Jeffrey L. Dziewit, a Wisconsin citizen, claims that he purchased title search and examination services from one of the Defendants on or about December 27, 1984. The purported class these Plaintiffs claim to represent consists of "all persons . . . who purchased title search and examination services from Defendants between January 7, 1981 to the present time." There has not been a motion to certify the class; nor has the class been certified at this time.

Defendants moved for summary judgment on the basis of *res judicata*, due process and the Filed-Tariff Doctrine, articulated in *Keogh v. Chicago & Northwestern Ry.*, 260 U.S. 156 (1922).

II. Summary Judgment Standard

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). "One of the principle purposes of the summary judgment rules is to isolate and dispose of factually unsupported claims." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). A motion for summary judgment against a party is appropriate when that party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322. The court must view the evidence presented on the motion in the light most favorable to the opposing party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

III. Discussion

Defendants' Motion for Summary Judgment should be granted under the doctrine of *res judicata*. Plaintiffs allege that they represent a class injured by the unfair price-fixing of Defendants. Defendants argue that the settlement in MDL 633 bars Plaintiffs' claims under *res judi-*

cata. However, *res judicata* will have no preclusive effect if the current plaintiffs were not adequately represented in the prior action or there was a violation of due process. *Hansberry v. Lee*, 311 U.S. 32 (1940); *Anderson v. John Morrell & Co.*, 830 F.2d 872 (8th Cir. 1987); *Haas v. Howard*, 579 F.2d 654 (1st Cir. 1978); *Valerie v. Boise Cascade Corp.*, 80 F.R.D. 626 (D.Cal. 1978), *aff'd*, 645 F.2d 699 (9th Cir. 1981), *cert. denied*, 454 U.S. 1126. Indeed, the Third Circuit Court of Appeals recognized that absent plaintiffs in the MDL 633 litigation could raise the issue of adequate representation in the forum of their choice. *In re Real Estate Title & Settlement Servs. Antitrust Litig.*, 869 F.2d 760 (3rd Cir. 1989).

Plaintiffs contend that *res judicata* does not preclude their lawsuit because the "representatives in MDL 633 failed to prosecute or defend the action with due diligence and reasonable prudence and the opposing party was on notice of facts making that failure apparent." In particular, Plaintiffs allege that the plaintiffs' attorneys in MDL 633 were unaware of Judge Muecke's decision in *United States v. Title Insurance Rating Bureau of Arizona*, 517 F. Supp. 1053, 1059 (D. Ariz. 1981), *aff'd*, 700 F.2d 1247, 1253 (9th Cir. 1983). Plaintiffs contend that Judge Muecke's decision should have acted as collateral estoppel during the MDL 633 litigation. Plaintiffs argue, therefore, that the attorneys' unawareness of Judge Muecke's decision was a failure to prosecute the class action with due diligence and reasonable prudence.

A. Plaintiffs' Assertion of Offensive Collateral Estoppel

In *United States v. Title Insurance Rating Bureau of Arizona*, two plaintiffs filed suit against the Title Insurance Rating Bureau, its members and subscribers, alleging that the defendants engaged in an unlawful conspiracy in violation of antitrust laws. Judge Muecke found that the Title Insurance Rating Bureau, its members and subscribers were not entitled to state action defenses, articu-

lated in *Parker v. Brown*, 317 U.S. 341 (1943). This decision was reached by applying the standards announced in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), and *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976). Judge Muecke held that a requirement for state action immunity as articulated in *Goldfarb* and *Cantor* was state "compulsion," by statute or regulation, of the private conduct. In essence, the State had to dominate the decision-making, significantly diminishing the private party's freedom of choice. Applying this standard, Judge Muecke held no state action immunity applied because Arizona did not compel uniform rate filing and the legislative history of A.R.S. section 20-375 suggested that the State had no intention of supplanting competition.

The Ninth Circuit affirmed. However, the Ninth Circuit applied a slightly different analysis. In 1980 the Supreme Court restated the requirements for state action immunity in *California Retal Liquor Dealers Association v. Midcal Aluminum*, 445 U.S. 97 (1980). First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy;" second, the policy must be "actively supervised" by the State. *Id.* at 105.

The Ninth Circuit only evaluated Arizona's Title Insurance regulations under the first requirement: whether the Arizona legislature had a clearly articulated and affirmatively expressed state policy to restrict competition. The court found there was no such policy, based on two findings. First, the statute itself "reflect neutrality by the Arizona legislature to competition and uniform rates, not a clearly articulated and affirmatively expressed state policy." Second, and "[i]mportantly, the state does not require uniform rates: it allows a title insurer to file independent rates separately, to file independent rates through a rating bureau, or to deviate from rates filed by a rating bureau on its behalf." *United States v. Title Ins. Rating Bureau of Ariz.*, 700 F.2d at 1253. Based on these conclusions, the Ninth Circuit did not consider

whether Arizona actively supervised its anticompetitive policy, the second factor for *Parker v. Brown* immunity. *Id.*

But for the intervening decision of the United States Supreme Court in *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48 (1985), the MDL 633 Defendants would have been bound by the Ninth Circuit's decision in *United States v. Title Ins. Rating Bureau of Ariz.*, 700 F.2d at 1253. *Southern Motor Carriers* altered the standard of the state action immunity doctrine. Specifically, *Southern Motor Carriers* held that a state policy that "expressly permits, but does not compel anticompetitive conduct" is not fatal to a claim of *Parker* immunity. 471 U.S. at 61-62.

Plaintiffs argue that *United States v. Title Insurance Rating Bureau of Arizona* would have been binding in the MDL 633 litigation on collateral estoppel grounds despite the intervening decision in *Southern Motor Carriers*. Such would be the case if Plaintiffs were relying on *res judicata* to bind the Defendants in MDL 633. *See Federated Dept Stores, Inc. v. Moitie*, 452 U.S. 394, 400-02 (1981). However, the public policy behind promoting an end to litigation by binding parties to earlier decisions despite changes in the law takes a dramatic turn when a stranger to the prior litigation attempts to collaterally estop the losing party in the prior litigation. Applying a literal interpretation of *Moitie* to such a situaton would allow strangers to bind losing parties to outdated principles of law and would delay evolution of the law and potentially deny parties of their due process rights. Such a result would amount to an unfair application of offensive collateral estoppel. For these reasons, the United States Supreme Court has stated that collateral estoppel "is not meant to create vested rights in decisions that have become obsolete or erroneous with time. . . ." *Montana v. United States*, 440 U.S. 147, 161 (1979) (quoting *Commissioner of Internal Revenue v. Sunnen*,

333 U.S. 591, 599 (1948)). In addition, the Court, in allowing the use of offensive collateral estoppel, gave district courts "broad discretion to determine when it should be applied." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979). Thus, even assuming collateral estoppel could have been asserted, the district court's reliance on *Southern Motor Carriers* in MDL 633 is a strong indicator that the court would not have exercised its discretion to allow the class-action plaintiffs to use offensive collateral estoppel against the defendants following an important change in the law. Thus, Plaintiffs' claims that the decisions in *United States v. Title Insurance Rating Bureau of Arizona* should have collaterally estopped the MDL 633 litigation are unfounded.

Moreover, collateral estoppel only applies if the basis of the first court's decision is clear. *See* Restatement (Second) of Judgments § 27(g) (1982). One of the reasons for Judge Muecke's ruling, and perhaps the primary reason for the Ninth Circuit's ruling, was Arizona's lack of compulsion. It is also unclear whether Judge Muecke considered the "active state supervision" requirement articulated in *Midcal*, 445 U.S. at 105. Instead, Judge Muecke appeared to have issued his opinion by looking at Arizona's intent to replace competition and Arizona's lack of compulsion. *United States v. Title Ins. Rating Bureau of Ariz.*, 517 F. Supp. at 1059. The Ninth Circuit never considered the "active supervision" requirement. *United States v. Title Ins. Rating Bureau of Ariz.*, 700 F.2d at 1253.

Furthermore, the degree of persuasiveness each court attached to Arizona's statute and legislative history is unclear. Instead, both courts emphasized that Arizona lacked "compulsion." *United States v. Title Insurance Rating Bureau of Ariz.*, 517 F. Supp. at 1059 ("In three separate provisions the legislature provides that a title insurer has the choice of filing its own escrow rates or having its rates filed by a rating organization."), *aff'd*,

700 F.2d at 1253 ("Importantly, the state does not require uniform rates. . . .").

In short, the basis for the decisions in *U.S. v. Title Ins. Rating Bureau of Arizona* are either unclear or were later modified by *Southern Motor Carriers.* Moreover, the district court in the MDL 633 action relied on *Southern Motor Carriers* in approving the settlement. MDL 633, 1986-1 Trade Cas. (CCH) ¶ 67,149 at 62,922-23, 62,932, 62,936. Thus, collateral estoppel clearly would have been inappropriate in the MDL 633 litigation. *See Montana v. United States,* 440 U.S. at 161; *Parklane,* 439 U.S. at 331.

Plaintiffs' final arguments in support of their assertion that they were not adequately represented are not persuasive. First, the "dearth of discovery" in the MDL 633 action does not necessarily warrant reopening the action. Decisions regarding the extent of discovery to be taken in a class action will depend heavily on the expense involved and the prospective gains to be reaped. In the MDL 633 litigation, all the parties were particularly concerned about the applicability of the state action defense. As noted below, the MDL 633 plaintiffs had good reason to be wary of the state action defense. The applicability of the state action defense also vindicates the MDL 633 court's evaluation of the fairness of the settlement. Finally, the ruling of the Arizona Court of Appeals against the Tucson Unified School District, discussed *infra,* greatly undermines Plaintiff's argument that the MDL 633 court improperly rejected the arguments made by the objecting states, including Arizona, that the settlement should not be approved because of the differing regulatory schemes among the states.

Therefore, Plaintiffs have failed to make a showing sufficient to establish the existence of inadequate representation, which is an element essential to their case, and on which they will bear the burden of proof at trial. *See Celotex,* 477 U.S. at 322. Consequently, this Court

finds that no genuine issue of material fact exists with regard to whether the representatives in MDL 633 prosecuted with due diligence and reasonable prudence. *See id.* This Court finds that the settlement in MDL 633 is not subject to collateral attack on the grounds of inadequate representation.

B. Defendants' Assertion of Res Judicata

The remaining question is whether the MDL 633 litigation creates a bar to the present litigation on *res judicata* grounds. Under the doctrine of *res judicata,* a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. *Parklane,* 439 U.S. at 326 n.5 (1979).

Defendants admit that they are the same Defendants that were in MDL 633. The named Plaintiffs, Brown and Dziewit, claim to have purchased title insurance in 1983 and 1984, respectively. The MDL 633 class consisted of:

> All Purchasers and insureds who purchased or received title insurance, including search and examination and/or settlement services, from any title insurance underwriter (whether or not a defendant herein) or any agent or such underwriter with respect to real estate located in any of the thirteen Affected States during the period from January 1, 1981 to December 31, 1985 inclusive.

Accordingly, the named Plaintiffs are part of the MDL 633 class.

In addition, the claims are the same. The Complaint alleges a combination and conspiracy among the Defendants to "fix, stabilize and maintain at agreed-upon price levels charges for title search and examination services." The Final Order in MDL 633 dismissed with prejudice:

> all claims . . . as against defendants, their respective parents, subsidiaries, agents, officers, directors, em-

> ployees, arising under the laws of the United States or of any state or other jurisdiction that are based on, relate to or arise out of any allegations that any of them agreed or conspired to fix, raise, maintain, stabilize, or otherwise affect the prices of title insurance, including title search and examination and/or settlement services.

MDL 633 Final Order. Therefore, the requirements for *res judicata*, identity of parties and claims, have been fulfilled and Defendants are entitled to summary judgment against the named Plaintiffs. Because the named Plaintiffs' claims are barred by the MDL 633 judgment, their inadequacy as class representatives mandates dismissal of this entire lawsuit. *Peltier v. Exxon Corp.*, 527 F.2d 757, 760 (9th Cir. 1975) (upholding dismissal of class action suit due to facial inadequacy of purported class representative).

Plaintiffs also argue that due process was violated because the MDL 633 court did not have personal jurisdiction over Arizona and Wisconsin residents, and that the MDL 633 decision therefore could not be binding against them. Relying upon *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), Plaintiffs claim that due process requires that Arizona and Wisconsin residents be permitted to opt-out before being bound to the MDL 633 class.

In *Shutts* the United States Supreme Court held that "a forum state may exercise jurisdiction over the claim of an absent class-action plaintiff, even though that plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant." *Shutts*, 472 U.S. at 811-12. The Court continued: "If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process." *Id.* at 811. *Shutts* raised an issue regarding the state of Kansas' authority to bind non-resident class members without alowing them to opt-out of the class. The Supreme Court held that Kansas state procedures satisfied due process when a fully descriptive notice was sent by first-class mail to each member with an explanation of their right to opt-out of the class. The Supreme Court limited its decision "to those class actions which seek to bind known plaintiffs concerning claims wholly or predominantly for money damages. *Shutts*, 472 U.S. at 811 n.3.

Shutts is distinguishable from the case at hand. The MDL 633 class was certified pursuant to Rules 23(b)(1) and 23(b)(2) of the Federal Rules of Civil Procedure, which do not provide the right to opt-out. The class in *Shutts* was certified under Kansas law. Consequently, contrary to what Plaintiffs suggest, the Court did not decide that absent class members, certified pursuant to Rules 23(b)(1) and 23(b)(2) must be permitted to opt-out in order to extinguish a claim for money damages or similar relief. Thus, the *Shutts* decision is limited to claims for money damages. In MDL 633 the class lawyers dropped all of their damage claims and reached a settlement containing equitable relief. For this reason, the application of *Shutts* to the present case is dubious.

Even if *Shutts* is applicable, that decision held that absent class members, lacking minimum contacts with the forum state, could be bound as long as minimal procedural due process was satisfied. *Shutts*, 472 U.S. at 811-12. The Plaintiffs raise no facts suggesting that the court presiding over MDL 633 failed to satisfy minimal procedural due process. Both parties' Statements of Facts admit that the MDL 633 judge ordered defendants to publish notice of the proposed settlement in 36 listed publications in the affected states, including Arizona and Wisconsin, on two separate days. Class members objecting to the proposed settlement were to file written objections to the court. In *Shutts*, the Supreme Court held that procedural due process was satisfied when a "fully descriptive notice" was mailed to each class member. *Shutts*, 472 U.S. at 812. Given the complexity of the MDL 633

litigation, notice of the settlement by publication and the opportunity to object to the settlement satisfied minimal procedural due process.

Therefore, the Court finds that Plaintiffs were proper parties to the MDL 633 settlement, that Plaintiffs were adequately represented in the action, and that Plaintiff should be bound to the terms of the MDL 633 settlement. Moreover, even assuming that *res judicata* would not bind the Plaintiffs to the MDL 633 settlement, the Court finds that state action immunity would bar Plaintiffs' claims in this lawsuit.

C. Defendants' State Action Defense

On January 14, 1991, Defendants submitted a Notice of Supplemental Authorities. This notice contained the Third Circuit Court of Appeals opinion in *Ticor Title Insurance Co. v. FTC*, No. 89-3787 (January 9, 1991). This opinion resulted from an appeal by Ticor from an FTC final order, which found Federal Trade Commission Act violations and antitrust violations by five title insurance companies operating in Arizona, Connecticut, Montana, New Jersey, Pennsylvania and Wisconsin. The five title insurance companies involved in the FTC appeal comprise most of the defendants in the case before this Court.

The Third Circuit found that the antitrust violations in Wisconsin and Arizona were barred by the state action doctrine. While not addressed in their Motion for Summary Judgment, Defendants assert this defense in their separate answers. The Third Circuit found that the applicable Arizona and Wisconsin statutes satisfied both prongs of the state action doctrine: (1) Arizona and Wisconsin had clearly articulated state policies to displace competition; and (2) Arizona and Wisconsin actively supervised these anticompetitive policies. Consequently, while not an issue addressed in Defendants' Motion for Summary Judgment, this Court is persuaded that

the Third Circuit Opinion in *Ticor v. FTC* in authority for the present situation. This finding is buttressed by the decision of the Arizona Court of Appeals in *Tucson-Unified School District v. Chicago Title Insurance Company*, 78 Ariz. Adv. Rep. 51 (App. 1991), which involved similar, if not identical, claims against the same Defendants involved in this lawsuit and MDL 633. In that case, the court noted that "[r]ate-making by title insurance rating bureaus is specifically authorized by Arizona law." *Id.* at 52. The court relied in part on *Southern Motor Carriers* in holding that Arizona's regulation of the insurance industry placed the Defendants' alleged activity beyond the reach of Arizona's antitrust laws. *Id.* at 52-53.

On February 11, 1991, Plaintiffs provided the Court with a recent Ninth Circuit case that they contend is contrary to *Ticor v. FTC*. In *Lancaster Community Hospital v. Antelope Valley Hospital District*, 60 Antitrust & Trade Reg. Rep. (BNA) 174, 175 (9th Cir. Jan. 18, 1991), the court hold that district courts "are to focus on whether the state's policy in to supplant or support competition in the area of dispute" in determining whether state action immunity applies. Plaintiffs contend that Arizona intended to promote, rather than replace, competition in the insurance industry. However, the Plaintiffs' position is contrary to the holding in *Tucson Unified School District v. Chicago Title Insurance Company*. Moreover, the *Lancaster* decision involved the application of municipal state action immunity, which is governed by *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985). This case involves the application of private state action immunity, which is governed by *Southern Motor Carriers*. The Ninth Circuit relied heavily on *Town of Hallie* in deciding *Lancaster*, but did not even mention *Southern Motor Carriers*, which the United States Supreme Court decided the same day as *Town of Hallie*. Thus, *Lancaster* clearly does not govern the outcome in this case.

The Court finds that *Ticor v. FTC* and *Tucson Unified School District* are persuasive authority in this case, and further finds that *Lancaster* is inapposite. Therefore, even if *res judicata* would not bar Plaintiffs' cause of action, the state action doctrine would be a bar.

CONCLUSION

The Court finds that *res judicata* bars the Plaintiffs from asserting the present action because they were proper parties to the MDL 633 settlement. Further, the Court finds that the state action doctrine would operate as a bar to Plaintiffs' claims even if *res judicata* were inapplicable.

IT IS THEREFORE ORDERED granting Defendants' Motion for Summary Judgment (Doc. #27).

DATED this 1st day of March, 1991.

[Signed]
Stephen M. McNamee,
United States District Judge

Copies to all counsel of record

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MDL Docket No. 633;
All Cases

IN RE REAL ESTATE TITLE and
SETTLEMENT SERVICES
ANTITRUST LITIGATION

[1986-1 Trade Cas. (CCH) ¶ 67,149]

MEMORANDUM OPINION AND ORDER

VANARTSDALEN, J. June 10, 1986

This action, MDL No. 633, results from twelve separate antitrust class actions which were originally filed in the United States District Courts in the Eastern and Middle Districts of Pennsylvania, the Southern District of New York, the Central District of California and the District of Oregon. The twelve actions were consolidated and transferred, where necessary, to this court by the Judicial Panel on Multidistrict Litigation in orders dated March 20, 1985, April 19, 1985 and May 8, 1985, pursuant to 28 U.S.C. § 1407.[1]

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[1] Three of the original twelve plaintiffs, Public Storage, Inc., 159-161 Stanton Street Realty Corp. and Bernard Koch, have stipulated that their claims be dismissed without prejudice. See Stipulation and Order dated June 14, 1985 (dismissing Public Storage, Inc.); Stipulation and Order dated August 13, 1985 (dismissing 159-161 Stanton Street Realty Corp.); and Order dated May 15, 1985 (dismissing Bernard Koch).

The plaintiffs allege that the six defendant title insurance companies (defendants), Chicago Title Insurance Company, First American Title Insurance Company, Lawyers Title Insurance Corporation, Safeco Title Insurance Company, Stewart Title Guaranty Company and Ticor Title Insurance Company, combined and conspired in violation of the federal antitrust laws to fix prices for title search and examination services and for settlement services in thirteen states: Arizona, Connecticut, Idaho, Louisiana, Montana, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Wisconsin and Wyoming (the affected states). The plaintiffs allege that defendants accomplished this combination and conspiracy through membership in state-authorized rating bureaus, which submitted prices for title search and settlement services for approval by the insurance departments in each of the thirteen affected states. The filing of the civil actions followed the initiation of an enforcement proceeding against the six defendants by the Federal Trade Commisison (FTC), alleging substantially similar conduct and involving the same thirteen states.[2]

The defendants, in their answers to the individual complaints, denied liability and denied that plaintiffs or any members of the proposed class had suffered any damages. The defendants also raised numerous, affirmative defenses to the complaints. In particular the defendants have consistently contended that they were protected against antitrust liability for their rating bureau activities by virtue of the McCarran-Ferguson Act, 15 U.S.C.

[2] After the Supreme Court's decision in *Southern Motor Carriers Rate Conference, Inc. v. United States*, —— U.S. ——, 105 S. Ct. 1721 (1985), the FTC dropped its claims against the six defendants arising from their conduct in Louisiana, New Mexico, New York, Oregon and Wyoming. The FTC significantly reduced the scope of its action against the six defendants in Pennsylvania and New Jersey. The FTC has maintained its action against the six defendants in Arizona, Connecticut, Montana, Idaho, Ohio and Wisconsin.

§ 1011-15, which exempts the business of insurance from the coverage of the antitrust laws, and the state action doctrine, which in general prevents the imposition of antitrust liability for activities conducted pursuant to state law. The defendants also contend that under the filed-tariff doctrine, plaintiffs and the members of the proposed class were not entitled to damages.

On March 27, 1985, the same day that the Judicial Panel on Multidistrict Litigation's first order transferring and consolidating the individual cases as MDL-633 was filed in this court, the United States Supreme Court decided *Southern Motor Carriers Rate Conference, Inc. v. United States*, —— U.S. ——, 105 S. Ct. 1721 (1985), which substantially redefined the principles governing the state action doctrine as applied to state authorized rating bureau activities. The Supreme Court in *Southern Motor Carriers* held that the state action defense to antitrust liability for rating bureau activity is established if (1) the state has a clearly articulated and affirmatively expressed policy permitting defendants' challenged conduct; and (2) the state actively supervises such conduct. The *Southern Motor Carriers* decision extended the state action doctrine to situations where the collective rate making conduct was permitted but not compelled by state law. The plaintiffs and their counsel could not reasonably have foreseen the Supreme Court's *Southern Motor Carriers* decision at the time they commenced this litigation or the severe negative impact it would have on their claims. As noted, after the *Southern Motor Carriers* decision, the FTC dropped its claims against the defendants for their rating bureau activities in the states of Louisiana, New Mexico, New York, Oregon and Wyoming and greatly limited the scope of the action against defendants in New Jersey and Pennsylvania. In the remaining six states, Arizona, Connecticut, Idaho, Montana, Ohio and Wisconsin, the FTC is apparently arguing that the state action doctrine does not apply to defendants rating bureau activities because the FTC contends those states did

not actively supervise the activity. Memorandum of Defendants Addressing Objections to Proposed Settlement Agreement, April 8, 1986 (Defendants' Memorandum), p.5.

Because of what I then viewed, and still view, as the possibly dispositive effect of the *Southern Motor Carriers* decision on this litigation, on May 20, 1985 I ordered that proceedings in this matter be limited to discovery on the narrow issue of whether the state action doctrine as set out in *Southern Motor Carriers* defeated plaintiffs' claims. Memorandum Opinion and Order No. 1 (Order No. 1), dated May 20, 1985, ¶¶ 16-17. I further ordered that discovery on the state action defense was to be completed by October 1, 1985, and defendants were permitted to file a joint consolidation motion for summary judgment on the state action doctrine on or before October 10, 1985. *Id.* at ¶¶ 3, 17. I specifically ordered plaintiffs not to file a motion for class certification until after disposition of the joint motion for summary judgment, *Id.* at ¶ 18. The May 20, 1985 order also established the procedures to be followed in the multidistrict litigation and appointed Allen D. Black, Esquire, of Fine, Kaplan and Black, as liaison counsel for plaintiffs and Peter Hearn, Esquire, of Pepper, Hamilton and Scheetz, as liaison counsel for defendants. *Id.* at ¶¶ 6-7.

It was, and still is, my understanding that all of the thirteen affected states have statutes which explicitly permit collective ratemaking, thus satisfying the first prong of the state action doctrine. Order No. 1 at p.4. As the result of my May 20, 1985 Memorandum Opinion and Order, the plaintiffs engaged in extensive discovery, particularly focusing on whether the affected states actively supervised the defendants' rate-making activities, the second prong of the state action doctrine. Affidavit of Allen D. Black, Esq., Relating to Plaintiffs' State Action Discovery Efforts (Black Affidavit re State Action Discovery), ¶ 4. Plaintiffs prepared comprehensive state action discovery requests directed at the six defendants, and document and deposition subpoenas were issued for the insurance departments and rating bureaus in the thirteen affected states. Black Affidavit re State Action Discovery at ¶¶ 6-7. Several hundred thousand documents relating to the supervision of title insurance rate filings were produced to plaintiffs by these entities. *Id.* at ¶ 11. These documents were distributed to the particular plaintiffs' counsel assigned to consider the state action defense in each state, and reviewed and analyzed by counsel. *Id.* at ¶ 12.

Plaintiffs interviewed numerous persons with knowledge relating to the title insurance industry and title insurance regulation, including insurance department personnel in the affected states, several experts with substantial experience in the title insurance field, the Attorney Generals' offices and watchdog agencies in several states, former employees at certain rating bureaus, and other persons with information relating to the operation of the major title insurance underwriters. *Id.* at ¶ 8. Plaintiffs also reviewed the publications of the American Land Title Association, which is the national trade association for the title insurance industry, and many of the independent trade associations which operated in the affected states, as well as the transcripts of hearings, reports and other publications of the National Association of Insurance Commissioners. *Id.* at ¶ 9.

As part of their discovery effort, plaintiffs filed a motion seeking to compel defendants to respond to interrogatories pertaining to possible instances of the inclusion of referral payment costs in rate submissions, payments to employees of state insurance departments and investigations into any such payments. Plaintiffs argued that the evidence that they sought through the interrogatories about improper influence and the inclusion of the cost of unlawful referral payments in rate submissions would have been relevant as tending to show that there was not active state supervision of the allegedly anticompetitive rating-bureau activities of the defendants. I ruled,

however, that the "active state supervision" element of the state action defense focuses on the required procedures by which the state controls the challenged setting of prices, not on the behavior or effectiveness of individual state employees in carrying out those procedures. Memorandum and Order No. 2 (Order No. 2), dated September 9, 1985. The decision denying plaintiffs' discovery motion further eroded plaintiffs' chances of succeeding on their claims by effectively curtailing the permissible scope of the contention that there was a lack of active state supervision. *Id.* at ¶ 14.

Negotiations regarding a possible settlement of this litigation began soon after the Supreme Court's decision in *Southern Motor Carriers* and continued throughout the state action discovery period. Affidavit of Allen D. Black Relating to Negotiations Leading to the Agreement of Settlement (Black Affidavit re Settlement Negotiations), ¶ 2. The negotiations were conducted on behalf of plaintiffs by Allen D. Black and Robert N. Kaplan, who were designated as Chairman and Vice-Chairman, respectively, of Plaintiffs' Executive Committee in my Order No. 1, dated May 20, 1985. Black Affidavit re Settlement Negotiations, at ¶ 3. Both Mr. Black and Mr. Kaplan are experienced and reputable counsel, who have extensive experience and expertise in antitrust and class action litigation. Mr. Black and Mr. Kaplan were selected by plaintiffs' Executive Committee as plaintiffs' sole representatives for purposes of conducting settlement negotiations with defendants and there was no competition from other plaintiffs' counsel to conduct the settlement negotiations or to represent the proposed class. *Id.* at ¶ 4. The negotiations involved seven face-to-face meetings with defendants' counsel and a large number of negotiating sessions conducted by telephone. *Id.* at ¶ 5. Each stage of the settlement negotiations was discussed and agreed upon by plaintiffs' Executive Committee. *Id.* at ¶ 6. All of the negotiations that led up to the settlement were conducted in good faith and at arm's length by plaintiffs' counsel. By early October, 1985, after the relevant documents and interviews in each of the affected states had been reviewed and evaluated by plaintiffs' counsel and after I had denied plaintiffs' motion to compel discovery, an agreement in principle was reached between plaintiffs and defendants to settle the litigation. *Id.* at ¶ 7, 11. On January 8, 1986, after further negotiations, the parties executed an Agreement of Settlement. Prior to its execution, the agreement was approved by plaintiffs' Executive Committee and each of the original named plaintiffs. *Id.* at ¶ 9.

The settlement agreement provides for both monetary and injunctive relief. For purposes of the agreement of settlement only, the defendants agree to stipulate to entry of an order confirming the following class pursuant to Federal Rule of Civil Procedure 23(b)(1) and/or (b)(2):

> All purchasers and insureds who purchased or received title insurance, including search and examination and/or settlement services, from any title insurance underwriter (whether or not a defendant herein) or any agent of such underwriter with respect to real estate located in any of the thirteen Affected States during the period from January 1, 1981 to December 31, 1985 inclusive.

Agreement of Settlement, dated January 8, 1986, ¶ 4.

The plaintiffs in the original cases which were consolidated in MDL No. 633 are to represent the class. *Id.* at ¶ 5. In paragraph 7 of the settlement agreement, the defendants agree that in "full and complete settlement of the claims asserted in this action against defendants," the following injunction shall be entered:

> A . Each defendant shall be enjoined until December 31, 1987 from joining or participating in any way in any rating bureau in the Affected States; provided that this injunction shall apply in Arizona, Connecticut, Idaho, Montana, Ohio and Wisconsin

regardless of whether any such state has clearly articulated and affirmatively expressed a policy permitting collective rate filing through rating bureaus subject to active supervision by the state; and provided further that this injunction shall not prohibit defendants from joining or participating in a rating bureau in Louisiana, New Jersey, New Mexico, New York, Oregon, Pennsylvania or Wyoming as long as such state has clearly articulated and affirmatively expressed a policy permitting collective rate filing through rating bureaus subject to active supervision by the state. Pending the date upon which the order approving the settlement and entering the injunction becomes final, each defendant agrees to be bound by the terms of this Paragraph 7A.

B. Each defendant shall be ordered affirmatively:

1. To increase by $5,000, without additional charge, the amount of insurance coverage for each title insurance policy for property located in any of the thirteen Affected States that has been issued by that defendant or its agent to an insured member of the Settlement Class during the class period as defined above;

2. With respect to transactions in which members of the Settlement Class did not become insureds of any of the defendants in the class period (either because they purchased title insurance for the benefit of others, or because they purchased title insurance from a non-defendant underwriter or an agent of a non-defendant underwriter), to provide the last $5,000 of insurance coverage without charge in connection with any new title insurace policy purchased from any of the defendants by such a class member for property located in any of the thirteen Affected States within the one year period following the date that the order approving the settlement becomes final; and

3. To make good faith efforts to inform members of the Settlement Class of their entitlement to the provisions described in Paragraph 7(B) at such times as individual class members may be entitled to benefit from such provisions, (i.e., when an insured class member makes a material claim under his policy; or when an insured class member is entitled to a re-issue rate on a new policy and the charge for the new policy is affected by the provisions of Paragraph 7(B)(1); or when a non-insured class member applies to purchase a new policy to which Paragraph 7(B)(2) applies.)

The defendants agree to use their best efforts to get regulatory approval of the settlement in the thirteen affected states. *Id.* at ¶ 10.[3] They also agree to pay "all of the necessary and reasonable expenses, excluding attorneys' fees, of the administration of the settlement" including the cost of Notice by Publication to the class. *Id.* at ¶ 11.

[3] Defendants submitted the proposed settlement to the insurance departments in all of the affected states. The insurance departments in eleven of the thirteen affected states, Arizona, Connecticut, Idaho, Louisiana, Montana, New Jersey, New Mexico, New York, Oregon, Pennsylvania and Wyoming, have written in response that they approve in concept, or do not object to, the proposed settlement. See Defendants' Memorandum, Exhibits B-F and Supplemental Memorandum of Defendants Addressing Objections to the Proposed Settlement (Defendants' Supplemental Memorandum), dated April 23, 1986, Exhibits A-F. The insurance departments in the remaining two states: Ohio and Wisconsin, have not officially stated that they would either approve or disapprove the proposed settlement, though there is some indication that if I approve the settlement, they will allow its implementation. Defendants' Supplemental Memorandum, Exhibits G, H (Affidavits of John F. Graybeal and Erich E. Everbach). Failure to obtain regulatory approval of the settlement agreement in any state will not effect the agreement unless the plaintiffs, in good faith, believe that the failure has materially reduced the benefits to be received by the class as a whole, in which case the plaintiffs are excused from performing their obligations under the settlement agreement. Agreement of Settlement, ¶ 10.

In return for these concessions, the plaintiff class agrees that the final judgment approving the agreement of settlement will dismiss with prejudice

> all claims the Settlement Class may have as against defendants, their respective parents, subsidiaries, affiliates, agents, officers, directors and employees, arising under the laws of the United States or of any state or other jurisdiction that are based on, relate to or arise out of any allegations that any of them agreed or conspired to fix, raise, maintain, stabilize or otherwise affect the prices of title insurance, including title search and examination and/or settlement services.

Agreement of Settlement, at ¶ 13.

Both parties agreed to seek authorization from the court to negotiate an agreement on either the amount of attorney's fees, costs and expenses of litigation to be paid by defendants or a maximum amount of attorney's fees, costs and expenses of litigation for which plaintiffs will apply to the court to be paid by defendants. Agreement of Settlement, ¶ 12. Defendants had the option of terminating the agreement if the parties were unable to negotiate a satisfactory fee award and were unwilling to submit the issue for me to decide. *Id.* Other than plaintiffs' counsel informing defendants' counsel of the approximate number of hours spent by plaintiffs' counsel on the case and the approximate lodestar value of that time, no negotiation of the amount of attorney's fees to be paid was discussed during the settlement negotiations. Affidavit of Allen D. Black Relating to Negotiations with Defendants Concerning Attorneys' Fees, dated April 23, 1986, ¶ 3. By order dated January 29, 1986, I tentatively approved the settlement agreement pending notice to the class and a hearing. I further authorized the parties to negotiate the amount of attorney's fees to be paid by defendants and instructed plaintiffs' counsel to file a fee application. Counsel for plaintiffs and defendants negotiated an agreement whereby

plaintiffs' counsel would apply to the court for attorney's fees and expenses not to exceed $650,000 in counsel fees and $65,000 in litigation expenses. On March 3, 1986, plaintiffs' counsel submitted an attorney's fee petition in conformity with this agreement.

In my January 29, 1986 order, I conditionally certified plaintiffs' proposed class under Federal Rule of Civil Procedure 23(b)(1) and (b)(2), and I directed defendants to provide notice of the proposed settlement agreement to the class by publication in thirty-six listed publications in the affected states on two separate days in February of 1986. The notice set out the description of the conditionally certified class and the terms of the proposed settlement. Order, dated January 29, 1986, Exhibit A. It also set April 10, 1986 as the date for the final hearing on the settlement agreement and instructed those objecting to the settlement to file written objections with the court on or before March 27, 1986, if they wished to challenge the proposed settlement agreement. All inquiries concerning the proposed settlement were to be directed to liaison counsel for plaintiffs or defendants' counsel, Bell, Boyd & Lloyd. Class members could request fee copies of the settlement agreement from Bell, Boyd & Lloyd.

Defendant filed the required proof of publication with the court on March 20, 1986.[4] Counsel for plaintiffs received over two hundred inquiries from class members concerning the proposed class. See Affidavit of Donald L. Perelman Relating to Responses from Class Members to the Notice of Proposed Settlement (Perelman Affidavit), dated April 23, 1986, ¶ 2. Many of these inquiries requested information on how to be included in the proposed class. *Id.* at ¶ 3. Counsel for defendants received over 450 requests for information about the settlement

[4] The aggregate weekday circulation of the thirty-six newspapers in which the notice was published, based on information obtained by defendants' counsel, is 6,250,814. Defendants' Supplemental Memorandum, Exhibit J (Affidavit of Patrick J. Roach), ¶ 4.

and forwarded copies of the proposed settlement agreement to each of the parties requesting information. Defendants' Memorandum, p. 31. Twenty letters from potential class members were filed with the court objecting to the proposed settlement. The Attorneys General of Montana, New Jersey, Ohio, Pennsylvania and Wisconsin (objecting states) filed a joint memorandum in opposition to the proposed settlement on behalf of their respective states as purchasers of title insurance and as parens patriae on behalf of their residents who are class members.[5] The State of Arizona also moved to be excluded from the proposed class on behalf of itself and its residents as *parens patriae*.

On April 10, 1986, I held the scheduled hearing as set forth in the notice of proposed settlement, at which an

[5] Although the objecting states have standing to object to the settlement based on their own purchases of title insurance and settlement services from the defendants, it is not at all clear that they have standing to object on behalf of their residents as *parens patriae*. The antitrust laws, 15 U.S.C. § 15c, permit suits by states as *parens patriae* for monetary damages. In this action, however, the objecting states did not originally bring suit, but rather they merely seek to object to a settlement. The settlement primarily provides injunctive relief, not monetary relief. Section 15c(b) also imposes various procedural requirements, such as notice to the state residents and the right to opt out of the state's action, which have not been complied with in this case. Furthermore, none of the objecting states has indicated that it plans to challenge the defendants' rating-bureau activities in their own respective states or elsewhere under 15 U.S.C. § 15c if they are successful in objecting to the settlement. In fact, one objecting state, Pennsylvania, has filed an amicus curiae brief in the action by the FTC, challenging the action against the defendants in Pennsylvania and arguing that the Pennsylvania regulatory scheme meets the requirements of *Southern Motor Carriers*. Defendants' Memorandum, Exhibit A (Amicus Curiae Brief of the Commonwealth of Pennsylvania, Insurance Department). Since the objecting states have properly presented their objections to the settlement as class members in their own right, I need not decide whether they have standing to challenge the settlement as *parens patriae* on behalf of their residents, who are members of the class.

opportunity to present evidence was afforded counsel, and argument was heard on the proposed settlement. The only objector who appeared and argued against the proposed settlement at the hearing was Matthew C. Lawry, Assistant Attorney General of Ohio, who represented the objecting states. Neither Mr. Lawry nor any of the other objectors presented any evidence at the hearing. Subsequent to the hearing, both plaintiffs and defendants submitted additional affidavits in support of the settlement and filed proposed findings of fact and conclusions of law.

Having set out the procedural posture of this case leading up to the proposed settlement, I turn to the question of whether, pursuant to Federal Rule of Civil Procedure 23(e), the settlement should be approved. Prior to addressing the adequacy and fairness of the settlement itself, I must consider whether certification of a class under Rule 23(b)(1) and/or (b)(2), as stipulated to in the proposed settlement, is proper. *See Greenfield v. Villager Industries, Inc.*, 483 F.2d 824, 832 (3d Cir. 1973) (there is no "impediment to determining class actions for purposes of settlement only").

I. *Class Certification*

Certification of a class under Rule 23(b)(1) and/or (b)(2) first requires that the proposed class meet the prerequisites of Rule 23(a). Rule 23(a) allows certification of a class only if

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

The numerosity requirement is easily satisfied in this case. The class, as proposed, is estimated to include more than 3.4 million people. Defendants' Supplemental Memo-

randum, Exhibit I (Affidavit of Robert L. Stratton), ¶ 7. It would clearly be impracticable to attempt joinder of all the members of the proposed class. None of the parties or objectors argue otherwise.

This case presents issues of law and fact common to all of the proposed class members. The primary legal issues in this case are whether plaintiffs' antitrust claims are barred by the state action defense, the McCarran-Ferguson Act and the filed tariff doctrine; or conversely, whether joint filing of rates by the defendant-competitors through rating bureaus as approved by state law, violates the prohibition against price-fixing combinations under the federal antitrust laws. These legal issues are common to the entire proposed class. See *In Re Sugar Industry Antitrust Litigation*, 73 F.R.D. 322, 335 (E.D. Pa. 1976) ("Antitrust, price-fixing conspiracy cases, by their nature, deal with common legal and factual questions about the existence, scope and effect of the alleged conspiracy"). The primary factual issues in this case would appear to be the extent of each individual defendants' participation in the rating bureaus and the quantum of active supervision of the rate-making process in each state. Although the involvement of the defendants in the rating bureaus and the extent of supervision may vary somewhat in the different affected states, the overall pattern of involvement as it applies to the state action defense is essentially the same. Furthermore, the commonality requirement of Rule 23(a)(2) is not as stringent as that of 23(b)(3) which requires that the common issues predominate in the litigation. See *Wilensky v. Olympic Airways, S.A.*, 73 F.R.D. 473, 477 (E.D. Pa. 1977); 7 C. Wright & A. Miller, *Federal Practice and Procedure* ¶ 1763 at 610 (1972).

Similarly, the claims of the class representatives, the plaintiffs in the individual suits which were consolidated in this litigation, are typical of those of the proposed class since they all involve challenges to defendants' participation in rating bureaus. The defenses raised by de-

fendants against the plaintiffs' claims are also the same as those that are raised against all of the proposed class members.

The objecting states argue that the differences in the regulation of the rating bureaus by the thirteen affected states makes the defendants' state action defense of different strength in each state. They contend that since the strength of defendants' state action defense will vary in each state, the corresponding strength of plaintiffs' claims will also vary in each state and, thus, the representative plaintiffs may not adequately represent the class members in states other than the states in which the class representatives are residents. Although this argument has some superficial appeal, it is flawed as an attack on certification of the proposed class because it is entirely speculative. See *Robertson v. National Basketball Association*, 389 F. Supp. 867, 899 (S.D.N.Y. 1975) ("Class action determination will not be denied, nor will the formulation of subclasses be required in the absence of a showing that the alleged potential conflicts are real probabilities and not mere imaginative speculation."); *Reynolds v. National Football League*, 584 F.2d 280, 286 (8th Cir. 1978) (theoretical conflicts of interest do not "require subclassification, disqualification of the named parties and class counsel, or disapproval of the settlement"). The objecting states, although given ample opportunity, have presented no evidence that the defendants' rating bureau activities were subject to materially different regulations or supervision in any of the affected states. This falure to present evidence is particularly problematic for the objecting states since presumably they are in the best position to provide evidence on the nature of the state regulation of the rating bureaus, at least in their own individual states.

The only objecting state to even address the issue of the nature of its regulation of rating bureaus was Wisconsin. In a letter to the court, dated April 16, 1986, two Assistant Attorney Generals from Wisconsin assert that

the state regulators did not take any regulatory action with regard to the fees for title search and examination submitted to them. They claim that no data or cost justification for the fees was submitted to the regulators from which it could be determined whether the fees were excessive, inadequate or unfairly discriminatory. The first problem I have with the letter from Wisconsin is that it is unsupported by any affidavits and it was never properly filed in this case. The second problem is that even if I accept the assertions in the letter as true, there is no indication whether the failure to actively supervise alluded to in the letter is a result of an inherent inadequacy in the Wisconsin regulatory scheme or merely an isolated example of a breakdown in the proper functioning of the system. As I pointed out in my Memorandum and Order No. 2, dated September 9, 1985, the active state supervision requirement of the state action defense focuses on the procedures by which the state controls the challenged setting of fees, not on the behavior or effectiveness of individual employees in carrying out those procedures. Finally, the defendants, in a reply to the Wisconsin letter, vehemently contest the assertion that Wisconsin does not actively supervise the collective rate-making process. The defendants note that they filed extensive written justifications with their rate proposals and also assert that the deposition evidence before the FTC shows that Wisconsin fully reviewed the submitted rate proposals. Thus, I find that the objecting parties have presented nothing more than a speculative challenge to the typicality of the representative plaintiffs' claims and the proposed class therefore meets the requirements of Rule 23(a)(3).

The final requirement of Rule 23(a) is that "the representative parties will fairly and adequately protect the interests of the class." Rule 23(a)(4). The Third Circuit Court of Appeals has held that adequacy of representation depends on two factors: "(a) the plaintiff's attorney must be qualified, experienced and generally able to conduct the proposed litigation, and (b) the plaintiff must

not have interests antagonistic to those of the class." *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239, 247 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975). The objectors do not challenge, nor do I question, the expertise and extensive experience of plaintiffs' counsel in litigating complex class actions. The second factor, that plaintiffs not have interests antagonistic to those of the class, is similar to the typicality requirement of Rule 23(a)(3) in that both requirements seek to insure that plaintiffs will properly present the claims of the class members. *Cohen v. Uniroyal, Inc.*, 77 F.R.D. 685, 691 (E.D. Pa. 1977). Plaintiffs' interests in this litigation are not antagonistic to those of the proposed class since the plaintiffs and the proposed class were all allegedly injured by essentially the same alleged illegal rating bureau activities of the defendants. As I found above, the potential differences between the regulation of the challenged rating bureau activities in the different affected states have not been shown to be material differences. I conclude that the requirement of Rule 23(a)(4) has been met in this case.

A. Rule 23(b)(1)

Having satisfied the requirements of Rule 23(a), the proposed class must also come under one or more of the three categories set out in Rule 23(b). The settling parties seek certification under Rule 23(b)(1) and/or (b)(2). I had conditionally certified the proposed class under both Rule 23(b)(1) and (b)(2) in the Order of January 29, 1986, in which I ordered notice of the proposed settlement to be published and in which I scheduled the final hearing on the proposed settlement.

Rule 23(b)(1) requires that:

> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (A) inconsistent or varying adjudications with respect to individual members of the class which would

establish incompatible standards of conduct for the party opposing the class or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

The settling parties rely on subsection (A) of Rule 23 (b)(1) and argue that any injunctive relief obtained by plaintiffs in individual actions could subject defendants to inconsistent rulings as to their participation in rating bureaus. I agree that there is a serious risk that courts in separate actions could impose inconsistent obligations on the defendants in trying to fashion injunctive relief that cures any potential antitrust problems that defendants' rating bureau activities were found to cause. This risk goes beyond the ever-present risk in multiple adjudications that one court may find certain activity to violate the antitrust laws and another may find no violation in the same activity. See *Bogosian v. Gulf Oil Corp.*, 62 F.R.D. 124, 132 (E.D. Pa. 1973), *vacated on other grounds*, 561 F.2d 434 (3d Cir. 1977), *cert. denied*, 434 F.2d 1086 (1978) ("[Rule 23(b)(1)(A)] requires not only 'inconsistent and varying adjudication,' but such adjudications must establish 'incompatible standards of conduct.'"). The risk of the inconsistent restructuring of defendants' rating bureau activities in this case is similar to the risk of inconsistent restructuring of the rules and practices of the National Football League which the court in *Reynolds*, 584 F.2d at 283-84, found sufficient to justify certification of a class under Rule 23(b)(1)(A). Thus I find that certification of the proposed class under Rule 23(b)(1)(A) is appropriate for purposes of the proposed settlement.

B. Rule 23(b)(2)

The settling parties also seek certification of the proposed class under Rule 23(b)(2) which provides for a class action where

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

In this case the proposed plaintiff class is challenging the defendants' rating bureau activities; activities which are generally applicable to the proposed class of title insurance and settlement services purchasers. The injunctive relief contained in the proposed settlement relates directly to the rating bureau activities of the defendants and thus provides a remedy for the class as a whole. Injunctive relief or declaratory relief with respect to the class as a whole would thus be appropriate. This case is properly certifiable under Rule 23(b)(2) since the proposed class seeks to define the defendants' relationship with the world at large by seeking to limit the defendants' rating bureau activities. *See Weiss v. York Hospital*, 745 F.2d 786, 811 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 1777 (1985).

The objecting states argue that this action cannot properly be certified under Rule 23(b)(2) since the relief sought by the class is primarily monetary. This argument overlooks the fact that the relief contained in the proposed settlement is primarily injunctive. The plaintiffs, in their original individual actions, had sought treble damages under 15 U.S.C. § 15. However, after re-evaluating their case in light of the *Southern Motor Carriers* decision, they in effect dropped their treble damage claim and now seek approval of the proposed settlement and its injunctive relief provisions. Certification of the proposed class under Rule 23(b)(2) is not precluded by the fact that the settlement provides for some monetary

relief in the form of title insurance policy enhancements, since the primary relief provided is injunctive and since the challenged conduct of the defendants is such that injunctive relief would be appropriate. See *Wetzel*, 508 F.2d at 251 (Class action maintainable under Rule 23 (b)(2) even though monetary relief is sought as well as injunctive relief). Thus I find that for purposes of the proposed settlement, the proposed class can be properly certified under Rule 23(b)(2).

Since I have found that the proposed class is properly certifiable under both Rule 23(b)(1)(A) and (b)(2), I need not consider the objecting states' argument that notice to the class was insufficient under Rule 23(c)(2), or the State of Arizona's request to opt out of the suit under the same section since that section only applies to classes certified under Rule 23(b)(3). See *Walsh v. Great Atlantic & Pacific Tea Co.*, 726 F.2d 956, 963 fn.3 (3d Cir. 1983) (No right to opt-out under Rule 23(b)(1) or (b)(2)).

Where an action is properly certifiable under either Rule 23(b)(1) or (b)(2) and Rule 23(b)(3), it has been held to be preferable to certify it under Rule 23(b)(1) or (b)(2) in order to avoid the added procedural requirements of a Rule 23(b)(3) class action. See *Wetzel*, 508 F.2d at 252-53 (if both Rule 23(b)(2) or (b)(3) are applicable, court should use 23(b)(2)), and *Robertson v. National Basketball Association*, 556 F.2d 682, 685 (2d Cir. 1977) (court should use Rule 23(b)(1) when both 23(b)(1) and 23(b)(3) are applicable.) See also 7A C. Wright and A. Miller, *Federal Practice and Procedure* §§ 1772, 1775 (1972).

Both the objecting states and the State of Arizona argue that even if Rule 23(c)(2) is not applicable, due process requires that the proposed class members be provided with more effective notice and be given the opportunity to opt out of the class. These two issues, notice and the right to opt out, are closely related since due

process would probably require that potential class members receive notice comporting with Rule 23(c)(2), including individual notice wherever possible of their right to opt out of the class if I were to require that such an opt-out option be provided in this case. See *Penson v. Terminal Transport Co.*, 634 F.2d 989, 994-95 (5th Cir. 1981) (notice of a proposed consent decree to member of a 23(b)(2) class inadequate where it failed to alert class member that consent decree contained an opt-out provision). However, if I decide that no opt-out provision is required, then the notice required by Rule 23(c) in this case, as in any other class action under Rule 23(b)(1) or (b)(2), "need only be such as to bring the proposed settlement to the attention of representative class members who may alert the court to inadequacies in representation, or conflict in interest among subclasses, which might bear upon the fairness of the settlement." Walsh, 726 F.2d at 963. I see no need in the present case to require that class members be permitted to opt-out of the proposed settlement. The rights of the proposed class are adequately protected by the Rule 23 requirements that the class be adequately represented by the representative plaintiffs and by qualified counsel, that the class receive some adequate form of notice of the proposed settlement and that the court approve the settlement only if it is fair, adequate and reasonable. *Kincade v. General Tire & Rubber Co.*, 635 F.2d 501, 507-08 (5th Cir. 1981); *Robertson*, 556 F.2d at 685-86.

I also note that the benefits of the proposed settlement are provided to the class members without any affirmative action on their part. Thus, they need not have actual notice of the settlement to benefit from it. See *Greenfield*, 483 F.2d at 833 (Published notice inadequate where class members had to affirmatively file a claim in order to obtain settlement benefits.).

Furthermore, I would not exercise any discretion I may have to require an opt-out provision in this case because to do so would go against the strong public policy in

favor of settlement of class actions. See *Cotton v. Hinton,* 559 F.2d 1326, 1331 (5th Cir. 1977) ("Particularly in class action suits, there is an overriding public interest in favor of settlement."). It is, in my view, highly unlikely that defendants would agree to settle this case if they would still face the prospect of having to defend against one or more suits on these same issues by parties who had opted out of the settlement. Given my pessimistic view of plaintiffs' chances of any recovery by way of either injunctive or declaratory relief or the award of monetary damages in this case after the *Southern Motor Carrier* decision, I would anticipate that the end result of the failure to settle this case would be the failure of any of the proposed class members to receive any recovery either monetary or injunctive against the defendants for any alleged antitrust violation. I find that, based on the objections to the settlement which I received and the presentation by Mr. Lawry on behalf of the objecting states at the April 10, 1986 hearing, that the published notice required by my order of January 29, 1986, which appeared in thirty-six newspapers in the affected states with a combined circulation of over six million, served its purpose under Rule 23(e) as set out in Walsh.[6] There-

[6] Each of the defendants has submitted an affidavit describing the difficulties that would be faced in trying to mail individual notice of the proposed settlement to the class members. Defendants' Memorandum, Exhibits H-M. Due to the nature of the title insurance business, the defendants do not keep current address lists of their insureds or of the purchasers of title insurance who often buy title insurance for the benefit of others. Even an exhaustive and time-consuming search of all the defendants' files, which are not centrally located, would not produce a complete or accurate list of the plaintiff' class or their addresses. The expense of requiring the defendants to provide individual notice to class members, assuming that it was even possible to provide such notice, would probably result in defendants withdrawing from the settlement. The settlement agreement itself provides defendants with an option to withdraw from the settlement if the court orders notice which would be substantially more expensive than the notice by publication agreed to by the settling parties. Agreement of Settlement, ¶ 6.

fore, this action can be properly certified under Rule 23(b)(1) and (b)(2) without an opt-out provision and without further notice to the class.

II. *Approval of the Settlement*

Having determined that the proposed class can be properly certified under Rule 23(b)(1) and (b)(2), I now turn to the question of whether I should approve the settlement reached by the representative plaintiffs and the defendants. In deciding whether to approve a settlement under Rule 23(e), I must determine whether the settlement is fair, adequate and reasonable. *Walsh,* 726 F.2d at 965 (3d Cir. 1983). The Third Circuit Court of Appeals in *Girsh v. Jepson,* 521 F.2d 153, 156-57 (3d Cir. 1975), borrowing from the Second Circuit's opinion in *City of Detroit v. Grinnell Corp.,* 495 F.2d 448, 463 (2d Cir. 1974), set out some of the relevant factors to be used in determining the fairness of a proposed settlement:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

In the view of the Second Circuit in *Grinnell,* the last factor, which subsumes many of the others, is the most important in judging the settlement. *Grinnell,* 495 F.2d at 455. See also *Kusner v. First Pennsylvania Corp.,* 74 F.R.D. 606, 608 (E.D. Pa. 1977), *aff'd,* 577 F.2d 726 (3d Cir. 1978) (quoting *Grinnell*).

Another important consideration in evaluating the fairness of the settlement, and one which directly influences my acceptance of the parties' presentation of the settlement in this case, is whether or not I find evidence of collusion among the parties, or whether the settlement was truly an arm's-length negotiated agreement. See *Cotton*, 559 F.2d at 1330 (5th Cir. 1977) ("Indeed, the trial judge, absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel."); *In Re Montgomery County Real Estate Antitrust Litigation*, 83 F.R.D. 305, 315 (D. Md. 1979) ("The factors tending to reveal the 'fairness' of a settlement are those which indicate the presence or absence of collusion among the parties."). One of the primary goals of the inquiry into the fairness, adequacy and reasonableness of the settlement is to insure that absent class members are not being unfairly deprived of the prospect of a reasonable recovery and that their interests were adequately represented by the class representatives. *Robertson v. National Basketball Association*, 72 F.R.D. 64, 68 (S.D.N.Y. 1976), *aff'd*, 556 F.2d 682 (2d Cir. 1977). However, in reviewing the fairness of the settlement and considering the objections of the class members I must avoid making the settling parties "justify each term of settlement against a hypothetical or speculative measure of what concessions might have been gained; inherent in compromise is a yielding of absolutes and an abandoning of highest hopes." *Milstein v. Werner*, 57 F.R.D. 515, 524-25 (S.D.N.Y. 1972). My role is to approve or disapprove the settlement as negotiated by the parties, not to rewrite it to conform with my own view of an ideal settlement, or that of any of the objectors. *Armstrong v. Board of School Directors*, 616 F.2d 305, 315 (7th Cir. 1980). Compromise is the essence of a settlement and as long as the compromises reached by the parties place the settlement within the range of settlements which are reasonable given the facts of the case, the settlement

should be approved. See *In Re Corrugated Container Antitrust Litigation*, 659 F.2d 1322, 1324-25 (5th Cir. 1981), *cert. denied*, 456 U.S. 998 (1982).

The first, and perhaps most important, factor I will examine is whether the settling parties negotiated the settlement in good faith. This factor is critical because in order to avoid the necessity of conducting a trial on the merits in approving a settlement it is necessary for the court to rely in substantial part on the evaluations of the case made by counsel. This reliance is only justified if counsel for the parties have negotiated the settlement at arm's length and in good faith. See *Weinberger v. Kendrick*, 698 F.2d 61, 74 (2d Cir. 1982), *cert. denied*, 464 U.S. 818 (1983). In the present case, in Order No. 1, dated May 20, 1985, an Executive Committee of Plaintiffs' Counsel was established and Allen D. Black and Robert N. Kaplan were appointed respectively as Chairman and Vice-Chairman. All negotiations on behalf of the plaintiffs were carried out by these two with the consent of the Executive Committee. Black Affidavit re Settlement Negotiations, ¶¶ 3, 6. This procedure avoided competition among plaintiffs' counsel to negotiate the settlement and allowed the plaintiffs to present a unified position to the defendants, thus avoiding some of the difficulties encountered when a settlement is negotiated by separate plaintiffs' counsel prior to class certification. *Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30, 33 (3d Cir. 1971). Both Mr. Black and Mr. Kaplan are able and experienced counsel and fully capable of adequately representing the class' interests and of negotiating a fair settlement. Discovery on the crucial issue of the applicability of the state action defense in the affected states had progressed sufficiently for plaintiffs' counsel to make an intelligent assessment of the strengths and weaknesses of their case prior to entering into extensive negotiations. I have noted earlier the extensive discovery efforts on the state action defense issue made by plaintiffs' counsel after my order limiting discovery to

that issue. Furthermore, in the course of my supervision of the case, I have been impressed with plaintiffs' counsels' diligence in pursuing the class's interests, and I have seen no evidence of any collusion between the parties as to any aspect of this case or in their settlement negotiations. Contested motions were presented to the court by the respective parties in a genuinely adversarial posture. Plaintiffs' counsel, Allen Black, in a sworn affidavit, has attested to the fact that the negotiations were "conducted in good faith and at arm's length." Black Affidavit re Settlement Negotiations, ¶ 10.

The objecting states argue that the shift from bringing this case as a Rule 23(b)(3) class action for treble damages to settling it as a Rule 23(b)(1) and (b)(2) class action providing essentially only injunctive relief, and the form of notice provided indicates some form of improper conduct on the part of plaintiffs' counsel. I reject these suggestions. First, both the certification of the class and the form of notice to the class required and received court approval. Second, the shift from a Rule 23(b)(3) class to a Rule 23(b)(1) and (b)(2) class was brought about by a concomitant shift from an action seeking treble damages to an action seeking primarily injunctive relief. That shift was the result of plaintiffs' counsels' reasonable reassessment of the strength of the case after the decision in *Southern Motor Carriers*. I find nothing in either the class certification or the notice to the class to indicate that plaintiffs' counsel was acting in anything but the best interests of the class. The objecting states also question the fact that the class in this case was not certified until after the settlement had been negotiated. However, as I noted above, the appointment of an Executive Committee of plaintiffs' counsel cured most of the evils usually associated with settlements negotiated prior to class certification.

Another challenge raised by the objecting states deserves mention. The objecting states argue that the plain-

tiffs' counsel may receive attorney's fees of $650,000 while, according to the objecting states, the plaintiff class will receive nothing of monetary value. I have not yet ruled on plaintiffs' counsel's fee petition. More importantly, I find no merit whatsoever in the objecting states' claim that the plaintiff class receives no monetary or other tangible benefits from the proposed settlement. Both the injunctive and the monetary aspects of the settlement provide tangible and genuine aid to the class, which, as I will discuss, is fair, reasonable and adequate in light of the apparent weakness of the plaintiffs' claims. One objector, remarking on the amount of the attorney fee sought, suggested that the fee be divided among the members of the class. The unreasonableness of this suggestion becomes evident when one considers that each class member, in the class of over three million people, would receive less than twenty-five (25) cents if the class split the fee award of $650,000 equally and no costs were involved in the distribution.

The objecting states question whether there was a simultaneous negotiation of the settlement and the attorney's fees. See *Prandini v. National Tea Co.*, 557 F.2d 1015, 1017 (3d Cir. 1977) (Improper to negotiate settlement and attorney's fees contemporaneously). However, counsel did not negotiate the amount of attorney's fees until after presenting the settlement agreement to me at a conference on January 28, 1986, at which time I authorized the parties to negotiate on the issue of attorney's fees. Based on all of the available information including affidavits, there has been no violation of *Prandini* in the negotiation of attorney's fees in this case. I therefore conclude that there were no improprieties in the negotiation of this settlement and that all negotiations took place at arm's length. Since I have found that the negotiations were carried out in good faith, with no collusion between the parties which could prejudice the absent class members, I may rely upon, and should be hesitant to ignore, the judgment of counsel in evaluating their case for pur-

poses of settlement. *Cotton*, 559 F.2d at 1330 (5th Cir. 1977).

The next major factor to be analyzed is the probability of plaintiffs recovering on their claims. This requires an examination not only of the probability of plaintiffs proving liability but also an examination of the risks plaintiffs face in proving damages and in maintaining this action as a class action through the trial. It is only after evaluating the strength of plaintiffs' case that I can properly determine whether the settlement provides fair and reasonable compensation to the plaintiff class. One of the purposes of a settlement is to avoid the necessity of having the court and jury resolve disputed issues of fact and law and thus my review of the strength of plaintiffs' legal claims is not intended as a resolution of the merits of plaintiffs' case. *Florida Trailer and Equipment Co. v. Deal*, 284 F.2d 567, 571 (5th Cir. 1960); *Grinnell*, 495 F.2d at 456 (2d Cir. 1974) ("It cannot be overemphasized that neither the trial court in approving the settlement nor this Court in reviewing that approval have the right or the duty to reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute.").

The primary obstacle to plaintiffs establishing antitrust liability in this case is the state action defense as set out by the Supreme Court in *Southern Motor Carriers*. Prior to the decision in *Southern Motor Carriers* the plaintiffs believed that they could avoid the state action defense because participation in the rating bureaus was permitted but not compelled by statute in the affected states. After the *Southern Motor Carriers* decision, it became clear that defendants could take advantage of the state action defense against plaintiffs' antitrust claims even though their participation in the rating bureaus was not compelled by the affected states. Under the state action defense the defendants' participation in rating bureaus would not be a basis for antitrust liability, regardless of its anti-

competitive effect, if the affected states had a clearly articulated and affirmatively expressed policy permitting such participation and if the states actively supervised the allegedly anticompetitive conduct. *Southern Motor Carriers*, 105 S. Ct. at 1727.

Plaintiffs' counsel conducted extensive discovery on the state action defense issue in the affected states from which it appeared that all of the affected states had statutes permitting collective ratemaking. My order of May 20, 1985 made clear that the existence of statutes explicitly permitting collective rate-making would satisfy the first prong of the state action defense. Even in the absence of explicit statutory authority, however, a defendant can satisfy the first prong of the test by showing that the "state's intent to establish an anticompetitive regulatory program is clear." *Southern Motor Carriers*, 105 S. Ct. at 1731. Thus, given their discovery, it was reasonable for plaintiffs' counsel to conclude that the first prong of the state action defense had been met.

Plaintiffs' counsel, therefore, quite properly focused the larger part of their discovery effort into examination of the second prong of the state action defense: active state supervision. Their evaluation of the results of their discovery efforts were informed by my decision on September 9, 1985, denying their motion to compel discovery. In that decision, I determined that the focus of the active state supervision is on the procedures set out by the state to control the anticompetitive collective rate-making rather than on the effectiveness of the individual state employees in carrying out those procedures. I based my decision on *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105-06 (1980), in which the Supreme Court found that the active state supervision requirement was not met where the state merely enforced the prices set by the private parties without any review of the reasonableness of the prices or monitoring of market conditions. The purpose of the second

prong is to prevent the state from authorizing private parties violating the antitrust laws without in some way regulating their conduct. *Id.* at 106.

Thus, I found that the focus of the second prong of the state action defense is on the procedures and regulations by which the state implements its regulation of the authorized collective rate-making. My decision made irrelevant plaintiffs' argument that the regulators in the affected states were failing to properly supervise the rating bureaus as required by their respective state statutes because of improper payments. Plaintiffs' counsel, supplied with their extensive discovery and my opinions on the state action defense, were able to legitimately conclude that plaintiffs' claims could not withstand defendants' imminent motion for summary judgment based on the state action defense.

The objecting states argue that the plaintiffs' counsel have taken too pessimistic a view of the plaintiffs' situation. They argue that the state action defense depends on each state's laws and thus that the strength of the defense varies from state to state. The only evidence the objecting states rely on, other than the letter from the assistant attorney generals from Wisconsin, is the fact that the FTC has not dropped its case against the defendants in all the states. However, this fact by itself is insufficient to support an inference that the plaintiffs have a viable claim in the states where the FTC has continued its action, just as the fact that the FTC has dropped its case in some of the states does not mean that the plaintiffs necessarily have no viable claims in those states. The more important factor in my evaluation of the settlement is that the objecting states (with the exception of Wisconsin), which are clearly the parties best able to provide information on their own laws and regulations regarding defendants' collective rate-making, have failed to provide any evidence by affidavit or deposition testimony to support their assertions that the state action defense would not bar plaintiffs' claims in every affected state.

The objecting states are in effect arguing that their own laws impermissibly authorize the defendants to violate the antitrust laws and yet they provide no evidence to support their assertions and there is no indication that they themselves in their respective sovereign capacities have challenged the defendants' conduct.

Wisconsin is the only objecting state even to attempt to provide evidence that defendants are not protected by the state action defense under its regulatory scheme. Wisconsin argues in a letter to the court that Wisconsin regulators have failed to properly evaluate defendants' rate submissions prior to approving them. Wisconsin claims that this failure means that the second prong of the state action defense has not been met in Wisconsin. As I have noted earlier, I do not find Wisconsin's arguments persuasive. Firstly, there is no indication that the alleged inadequate supervision by the Wisconsin regulators is attributable to inadequate regulatory procedures—the only relevant criteria under the second prong of the state action defense. Secondly, the settling parties strongly challenge Wisconsin's assertions that it failed to actively supervise the defendants' rating bureau activities. The defendants, in their reply to the letter from Wisconsin, filed on May 15, 1986, refer to the deposition of Norman Wirtz, the insurance analyst employed by the Wisconsin Insurance Commissioner, which was taken as part of the FTC proceeding. The deposition indicates that the rate proposals submitted by the rating bureau in Wisconsin were extensively reviewed prior to their approval. The defendants also note that their submitted rate proposals were accompanied by extensive written justifications. Thus, I find that the objecting states, including Wisconsin, have done nothing more than present speculative, unsupported challenges to plaintiffs' counsel's evaluation that plaintiffs' claims would stand almost no chance of succeeding in the face of the state action defense in any of the affected states. I will not upset the settlement

negotiated by the parties based on the speculative challenges of the objecting states. *Reynolds*, 584 F.2d at 286.

Although the state action defense in my view presents an almost insurmountable obstacle to plaintiffs' ability to establish defendants' liability, two other substantial obstacles also exist in this case. The first is the exemption from antitrust liability provided for the "business of insurance" by the McCarran-Ferguson Act, 15 U.S.C. § 1012, where the state regulates the business. As with the second prong of the state action defense, the relevant inquiry in determining whether the state regulates the business of insurance is whether the state has established procedures to regulate the conduct, not whether those procedures were properly carried out. See *Schwartz v. Commonwealth Land Title Insurance Co.*, 374 F. Supp. 564, 575-76 (E.D. Pa. 1974). It is my preliminary conclusion that title search and examination services, which are the main focus of plaintiffs' antitrust claims, are part of the business of insurance since they are closely related to the issuance of title insurance and have been services historically provided by title insurance companies, which would fall under the protection of the McCarran-Ferguson Act. Accord *Schwartz*, 374 F. Supp. at 572-75 (Title insurance company is protected by McCarran-Ferguson Act from antitrust liability for collective rate setting of "seller-charge" which covered cost of services incidental to transfer of title, including title search, as part of the business of insurance). But see *United States v. Title Insurance Rating Bureau of Arizona*, 517 F. Supp. 1053 (D. Ariz. 1981), *aff'd*, 700 F.2d 1247 (9th Cir. 1983), *cert. denied*, 467 U.S. 1240 (1984) (escrow services held not to be part of the business of insurance). Although no discovery was conducted specifically on the McCarran-Ferguson Act issue, it would seem that the discovery on the state action defense which showed the involvement of the affected states in the collective rate-making process indicates that the McCarran-Ferguson Act also poses a very significant if not insurmountable ob-

stacle to the establishment of liability against the defendants.

The final obstacle faced by plaintiffs, in even establishing a cause of action, is the filed tariff doctrine set out by the Supreme Court in *Keogh v. Chicago v. Northwestern Ry.*, 260 U.S. 156 (1922).[7] Under this doctrine, the plaintiffs may have been unable to recover damages based on the allegedly anticompetitive rates charged by the defendants because those rates were approved by the state regulatory agency. *City of Newark v. Delmarva Power & Light Co.*, 467 F. Supp. 763, 769 (D. Del. 1979). None of the objecting parties have made any mention of the risks posed by the McCarran-Ferguson Act or the filed tariff doctrine in their challenges to the settlement.

The objecting parties also fail to address the difficulties plaintiffs would face in proving damages. There is no evidence that the rates arrived at by the rating bureaus are higher than those that would have been set had the collective rate-making not occurred. Furthermore, plaintiffs would have faced difficulites in maintaining a class action throughout the proceedings. Although for purposes of settlement I have found that certification of a class is appropriate, new problems would arise if the factual issues in this case had to be fully litigated. The decision as to liability and damages in each affected state might well have required the formation of subclasses or separate classes. The objecting states themselves suggest that damages and possibly impact may have to be proved for each class member. Joint Memorandum of Objecting States, p.13. Thus I conclude that the difficulties set out above would make it extremely unlikely that the plaintiffs would have been awarded any relief, monetary or injunctive, on their claims had this case not settled.

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[7] The *Keogh* doctrine was recently reaffirmed by the Supreme Court in *Square D Company and Big Building Supply Corp. v. Niagara Frontier Tariff Bureau, Inc.*, 54 U.S.L.W. 4520 (May 27, 1986).

In addition to the substantial legal difficulties outlined above, plaintiffs also faced the practical difficulties of pursuing this complex litigation. This action was settled prior to defendants' filing their anticipated motion for summary judgment based on the state action defense. The expense and effort required to respond to the anticipated motion would have been very substantial. Furthermore, defendants, having invested equivalent time and expense in preparing the motion, may well have been less likely to agree to a settlement once the motion had been filed. Even in the unlikely event that plaintiffs were able to avoid summary judgment on the state action defense, further motions based on the other defenses would likely follow. These motions and the responses to them would require additional discovery and delay. The actual trial or trials of this case or these cases would also be complex and lengthy involving difficult issues of liability and damages. Thus, even if these cases were to proceed, the delay and expense involved in obtaining any relief for the class would be enormous.

The fairness and adequacy of the settlement can only be properly evaluated by taking into consideration the overwhelming risks which plaintiffs faced in achieving any benefits through litigation. *Bogosian v. Gulf Oil Corp.*, 1985-1 Trade Cas. (CCH) ¶ 65,510, p. 65,549 (1985). The settlement provides two distinct benefits to the plaintiff class. The first is a $5,000.00 enhancement of plaintiffs' title insurance policies. Agreement of Settlement, ¶ 7(B). The second is an injunction against defendants' participation in rating bureaus until December 31, 1987. Agreement of Settlement, ¶ 7(A). The objecting parties argue that these benefits are of no value to the plaintiffs and thus are inadequate. I find, however, that both the monetary and the injunctive provisions of the settlement are of substantial value to the plaintiffs, even though they may not provide any practical monetary relief to some members of the class. Given the risks posed by continued litigation, the value of the settlement is fair

and adequate compensation for plaintiffs' waiver of their claims.

The defendants have agreed to increase the amount of coverage on all title insurance policies issued by them to class members in the affected states. The defendants have also agreed to provide without charge the last $5,000 of coverage on new policies issued within a year to class members who either bought title insurance for the benefit of others or who bought title insurance from a nondefendant company during the reelvant period, from January 1, 1981 to December 31, 1985. The benefits provided in this section of the settlement are applied automatically to the plaintiffs' insurance policies and the defendants have agreed to make good faith efforts to inform class members of the benefits of the settlement when class members are entitled to those benefits (*i.e.*, when an insured class member makes a claim under his policy, or when an insured class member is entitled to a re-issue rate discount on a new policy and the charge for the new policy is affected by the enhancement provisions; or when a non-insured class member applies to purchase a new policy to which the settlement applies). Agreement of Settlement, ¶ 7(B)(3). Any violation of this provision, which will be contained in the injunction issued pursuant to the settlement, would be enforceable in a contempt proceeding.

The additional $5,000 of title insurance coverage is a benefit to all the class members, regardless of whether or not they make claims on their title insurance policies. The additional coverage represents an additional shifting of the risk of a failure of title from plaintiffs to defendants. As with any insurance, this shifting of risk by itself represents a benefit to the plaintiffs. Although the title search which accompanies the issuance of a title insurance policy is meant to minimize and/or eliminate the risk to the defendants that the title will later prove in some way defective, the defendants have presented evi-

dence that title insurance companies nationwide have paid out, on the average, close to eight percent of their gross operating revenue on losses in the period between 1981 and 1984. Affidavit of Robert L. Stratton, ¶ 19.[8] Thus, title insurance still represents the shifting of an appreciable risk to the defendants and any additional shifting of that risk is a valuable benefit to the plaintiff class whether or not a loss occurs or a claim is made. Defendants' have asserted that it would cost a class member approximately twenty dollars to purchase the additional coverage provided by the settlement. Affidavit of Robert L. Stratton, ¶ 11. The additional insurance is, of course, of greater value to those class members whose property has increased in value and who suffer a loss due to a defect in title. The fact that some class members receive this added benefit does not alter the fact that all the class members receive some benefit regardless of whether they ever file a claim.

The additional insurance also provides benefits to the class members because it entitles them to higher reissue and refinance rate credits on policies they may buy in the future. Affidavit of Robert L. Stratton ¶ 12. This benefit arises because these credits on new policies are usually based on the amount of coverage of the old policy. The value of this benefit is not dependent on whether a class member ever files a claim on his title insurance policy. Thus, I conclude that the policy enhancement provision provides a distinct benefit to the plaintiff class.

Some of the objecting parties including the objecting states argue that the benefits conferred by the settlement do not adequately reflect the fact that some of the plaintiffs were purchasers of large title policies while others were purchasers of small policies. However, one of the

[8] The objecting states argue that the pay out rate is below 5%. However, their figures are based only on title insurance companies in Ohio, rather than on the nationwide sample on which defendants' figures are based. I place more weight on defendants evidence because it is based on a larger sample.

legitimate purposes of a settlement is to avoid the necessity of litigating the claims of the individual class members. Further, it is not at all clear that any alleged overpayments for title services would be directly proportional to the amount of coverage of the title insurance policy. Apparently purchasers of large policies are often able to obtain discounts from the defendants. Defendants' Memorandum at p.15. There is no evidence that the challenged services are priced directly on the total amount of the title insurance coverage. The practical difficulties involved in establishing a proportional enhancement of plaintiffs' policies would substantially increase the cost of the settlement to the defendants and it was reasonable for the plaintiffs' counsel to accept a uniform enhancement as a compromise in the settlement negotiations.

Some of the individual objectors argue that because of their circumstances, they will not benefit from the enhancement provision. Even if I accept the truth of their assertions, they still benefit from the injunctive relief. Also, I would not disapprove the settlement based on a small number of class members who may not benefit from the enhancement provision when to do so would deny all the benefits of the settlement to the entire class. There is no evidence that there are a significant number of class members who will not benefit from the enhancement provision.

The settlement also provides for benefits to class members who either purchased title insurance for the benefit of others or who purchased title insurance from a non-defendant company. These class members receive the last $5,000 of coverage free on any new policy which they purchase from a defendant within a one-year period running from the final approval of the settlement. The free coverage will reduce the cost of the premium by approximately $20.00. Affidavit of Robert L. Stratton, ¶ 17. The free coverage will also be available for class members who are paying for a new policy when refinancing a

home. Given the recent drop in interest rates, it is likely that an increased number of class members will benefit from this provision. *Id.* at ¶ 18. Many of the objecting parties argue that this provision is inadequate because it does not allow the plaintiffs to aggregate the free policy coverage they would receive for each title insurance policy purchased during the relevant period and because the benefit provided by this provision only extends for one year. These objections are without merit because, while the alternatives they suggest would increase the benefit to the class members, the adequacy of the settlement is measured not by the absolute value of the settiement, but by the relation of that value to the probability of recovery on the merits. Given the weakness of plaintiffs' claims, the fact that plaintiffs' counsel had to compromise on a settlement which does not provide all the relief suggested by the objectors does not mean that the settlement is inadequate. I note that with the exception of the state objectors, none of the objecting parties even mention the difficulties plaintiffs would have succeeding on the merits of their claims. The majority of the individual objectors to both the enhancement provision and the new policy provision do no more than complain that they would prefer to receive money rather than increased policy coverage. However, with a class that is estimated to number over three million, even the smallest of direct monetary awards would result in the defendants paying out tens of millions of dollars. It is not surprising then that the defendants refused to agree to any direct monetary settlement when faced with plaintiffs' extremely weak claims. It is also worth noting that out of a class of over three million, only twenty objections were filed other than those filed by the states.[9]

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[9] Counsel for plaintiffs and defendants received hundreds of inquiries as the result of the published notice and sent out a copy of the settlement agreement to each inquiring party. See Perelman Affidavit, Exhibit A (list of parties making inquiries to plaintiffs' counsel), and Defendants' Memorandum, Exhibit G (list of parties making inquiries to defendants' counsel). Allowing for overlap in the lists, close to 600 people received copies of the settlement agreement from counsel for the settling parties. Even if I were to make the unlikely assumption that only those people who made inquiries had received notice of the proposed settlement, the number of objectors still comes to less than 5% of the inquiring class members. See *Bryan v. Pittsburgh Plate Glass Co.*, 494 F.2d 799, 803 (3d Cir. 1973), *cert. denied*, 419 U.S. 900 (1974), *reh'g denied*, 420 U.S. 913 (1975). (Class action settlement approved even though 20% of the class objected). Thus, I find that the response of the class to the settlement is a factor favoring approval of the settlement.

In addition to the monetary benefits provided by the settlement, the plaintiff class also benefits from the injunctive relief specified in the settlement. The settlement enjoins the defendants from participating in any way in rating bureaus in Arizona, Connecticut, Idaho, Montana, Ohio and Wisconsin until December 31, 1987. In the other affected states—Louisiana, New Jersey, New Mexico, New York, Oregon, Pennsylvania and Wyoming—the defendants are prohibited from participating in rating bureaus unless the state has a clearly articulated and affirmatively expressed policy permitting collective rate-making and actively supervises the process. Agreement of Settlement, ¶ 7(A). Plaintiffs' claims are based on the allegedly anti-competitive effects of collective rate-making as to discrete title insurance services, and thus the injunctive relief limiting participation in rating bureaus, as to all title insurance services, provides extensive relief responsive to plaintiffs' claims. The defendants, in the states where they are barred from collective rate-making, are foregoing their right to participate in collective rate-making even though it otherwise would satisfy the requirements of *Southern Motor Carriers*. In the other states, the defendants are foregoing their reliance on the other defenses to liability, in particualr the McCarran-Ferguson Act defense. Plaintiffs are receiving a benefit in these states that they could not have received at trial, even if ultimately successful, since defendants are foregoing their right collectively to set prices for title insurance premiums as well as settle-

ment services. Title insurance premiums are clearly covered by the McCarran-Ferguson Act. Thus, the injunctive provisions of the settlement provide a substantial benefit to the plaintiff class, beyond that which is sought in the complaint or could even arguably be obtained upon totally successful litigation.

The objectors argue that the injunction is inadequate since it only applies until December 31, 1987. However, this challenge, like that to the monetary aspects of the settlement, is without merit because it overlooks the fact that plaintiffs would not be likely to receive any injunctive relief were this case to proceed. I also reject the argument that the injunction is valueless because the defendants have already withdrawn from rating bureaus in the affected states. Absent the settlement, there is nothing to prevent the defendants from rejoining rating bureaus in any of the affected states, with the exception of New Mexico where the statutory rule permitting collective ratemaking has been eliminated.

The objecting states also argue that only a cash recovery is an appropriate remedy for a price-fixing violation. However, given the weakness of plaintiffs' claims; the defendants assert, and it seems reasonable to believe, that they would never agree to a cash settlement. Furthermore, non-cash recovery settlements have been approved in antitrust class actions. See *In re Cuisinart Food Processor Antitrust Litigation,* 1983-2 Trade Cas. (CCH) ¶ 65,680 at p.69,474 (D. Conn. 1983), and cases cited therein. Thus, I conclude that the injunctive and monetary provisions of the settlement provide substantial benefits to the plaintiff class which are fair and adequate in view of the plaintiffs' chances of succeeding on the merits of their claims.

The adequacy of the settlement is not adversely affected by the fact that the monetary provisions are subject to approval by the regulatory agencies in the affected states. The defendants have agreed to use their best efforts to

obtain approval of the settlement. Agreement of Settlement, ¶ 2. To date, the defendants have submitted letters from eleven of the thirteen affected states establishing that those states agree with or at least do not oppose the settlement. Defendants' Memorandum, Exhibits B-F; Defendants' Supplemental Memorandum, Exhibits A-F. Ohio and Wisconsin, the two remaining states, have yet to state a position with regard to approval of the settlement. However, even if these states were not to approve the monetary portions of the settlement, the class members in those states would still have the substantial benefit of the injunctive provisions. Therefore, the objecting states' concern over regulatory approval does not alter the conclusion that the settlement provides fair and adequate benefits to the class.

The objecting states also challenge the settlement as having an illegal anticompetitive effect. This argument is based on the fact that class members who purchased title insurance for the benefit of others or who purchased from nondefendant companies will have to purchase any new policies from the defendants in order to obtain the monetary benefits of the settlement by way of insurance policy enhancement. The objecting states have provided no evidence in support of their assertions of anticompetitive effect nor have any of the nondefendant title insurance companies, who would be the alleged victims of any anticompetitive effect, presented any objections to the settlement. Also none of the state insurance departments, who are responsible for approving rates, have raised any challenge to the settlements as to purported anticompetitive effect.

I find that the settlement in this case is distinguishable from that in *New York v. Dairylea Cooperative,* 547 F. Supp. 306 (S.D.N.Y. 1982), *appeal dismissed,* 698 F.2d 567 (2d Cir. 1983), where the court disapproved a settlement in an antitrust case because of its anticompetitive effect. The settlement in that case provided for a coupon

plan under which the defendants were to distribute "cents-off" coupons for their product over a five-year period. The court was concerned that the coupon plan was little more than a marketing program for the defendants which they could manipulate by controlling the timing and location of the coupons. *Id.* at 308. In this case, the defendants have no discretion on when or where to provide the benefits specified in the settlement. Also the court in *Dairylea* was concerned that the settlement made no attempt to specifically reimburse those allegedly overcharged in the past. *Id.* In this case the settlement benefits are targeted directly at those who have bought title insurance in the past. Thus, I find that the concerns raised by the court in *Dairylea* are not present in this case. Furthermore, settlements involving redeemable coupons have been approved by other courts in the past. See *In re Cuisinart*, ¶ 65,680 at p.69,474, and cases cited therein.

My conclusion therefore is that, based on the relevant factors, the settlement negotiated by the parties in this case is reasonable, fair and adequate. The settlement was negotiated for the plaintiff class by competent counsel who observed their duty to protect the interests of the entire class and who had the benefit of extensive discovery when evaluating the case. The settlement they worked out provides substantial benefits to the entire plaintiff class when considered in light of the almost insurmountable difficulties that the plaintiffs would have faced in obtaining any relief had they continued with this litigation. The complexity and expense of continued litigation only add to the legal difficulties plaintiffs faced on the merits of their claims. I find that the objections to the settlement are without merit and should not and do not prevent approval of the settlement. The objecting parties were given ample opportunity to present and argue their objections. Therefore, pursuant to Federal Rule of Civil Procedure 23(e), I will approve the settlement of this antitrust class action suit.

FINAL ORDER AND JUDGMENT

NOW this 10th day of June, 1986, the Court, having held a hearing on April 10, 1986, and having considered the Settlement Agreement dated January 8, 1986, the affidavits and memoranda in support of the settlement, and the objections to the settlement, it is hereby ordered, adjudged and decreed:

1. The notice directed to the members of the class pursuant to the Court's Order of January 29, 1986, comports with the requirements of Rule 23(e), Federal Rules of Civil Procedure, and brought the proposed settlement of sufficient representative class members who were in a position to bring to the Court's attention any inadequacies in the proposed settlement, any inadequacies in representation, or conflicts of interest among class members.

2. For purposes of this Final Order and Judgment, the term "Affected States" shall mean the states of Arizona, Connecticut, Idaho, Louisiana, Montana, New Jersey, New Mexico, New York, Ohio, Pennsylvania, Wisconsin and Wyoming.

3. Pursuant to Rules 23(a) and 23(b)(1) and (b)(2) of the Federal Rules of Civil Procedure, the following class is confirmed in this litigation:

> All Purchasers and insureds who purchased or received title insurance, including search and examination and/or settlement services, from any title insurance underwriter (whether or not a defendant herein) or any agent of such underwriter with respect to real estate located in any of the thirteen Affected States during the period from January 1, 1981 to December 31, 1985 inclusive.

The judgment herein includes all members of the class described above.

4. The representative plaintiffs have fairly and adequately protected the interests of the above-described class.

5. Each of the objections filed with the court has been considered, is found to be without merit, and is hereby overruled.

6. The terms of the Settlement Agreement dated January 8, 1986 between plaintiffs and the class and each of the defendants are fair, reasonable and adequate to the class, and the Agreement is approved pursuant to Rule 23(e), Federal Rules of Civil Procedure.

7. In accordance with the terms of the Settlement Agreement, as approved by the court, it is hereby ORDERED:

A. Each defendant is enjoined until December 31, 1987 from joining or participating in any way in any rating bureau in the Affected States; provided that this injunction shall apply in Arizona, Connecticut, Idaho, Montana, Ohio and Wisconsin regardless of whether any such state has clearly articulated and affirmatively expressed a policy permitting collective rate filing through rating bureaus subject to active supervision by the state; and provided further that this injunction shall not prohibit defendants from joining or participating in rating bureaus in Louisiana, New Jersey, New Mexico, New York, Oregon, Pennsylvania or Wyoming as long as such state has clearly articulated and affirmatively expressed a policy permitting collective rate filing through rating bureaus subject to active supervision by the state;

B. Each defendant is ordered to increase by $5,000.00, without additional charge, the amount of insurance coverage for each title insurance policy for property located in any of the Affected States that has been issued by that defendant or its agent to an insured member of the Class during the period January 1, 1981 through December 31, 1985, inclusive;

C. With respect to transactions in which members of the Class did not become insureds of any of the defendants in the class period (either because they purchased

title insurance for the benefit of others, or because they purchased title insurance from a non-defendant underwriter or any agent of a non-defendant underwriter), each defendant is ordered to provide the last $5,000.00 of insurance coverage without charge in connection with any new title insurance policy purchased from any of the defendants by such a class member for property located in any of the Affected States within the one year period following the date that this order becomes a Final Order. As used herein, the term Final Order refers to the expiration of the time to appeal from this Final Order and Judgment without the filing of a notice of appeal or other request for appellate review or if an appeal is taken, the final affirmance of this Final Order and Judgment on appeal (or other appellate review) or the final dismissal of any appeal from this Final Order and Judgment;

D. Each defendant is ordered to make good faith efforts to inform members of the Class of their entitlement to the provisions described in Paragraphs 7B and 7C above, at such times as individual class members may be entitled to benefit from such provisions, (i.e., when an insured class member makes a material claim under his policy; or when an insured class member is entitled to a re-issue rate on a new policy and the charge for the new policy is affected by the provisions of Paragraph 7B above; or when a non-insured class member applies to purchase a new policy to which Paragraph 7C applies.);

E. The enhancement to be provided pursuant to Paragraph 7B above will apply regardless whether the class member has knowledge of any pending claim at the time the enhancement becomes effective;

F. The enhancement to be provided pursuant to Paragraph 7B above will apply retroactively to any claim by a class member which results or has resulted in a settlement or judgment causing a payment by the defendant of pre-enhancement policy limits and necessitating a contribution from the insured in which case the insured will be entitled to an additional payment in the amount of his

required contribution to the extent of the enhancement. However, with respect to claims finally resolved and files closed prior to January 8, 1986, defendants shall have no affirmative obligation to reopen such files to locate potential claimants;

G. The enhancement to be provided pursuant to Paragraph 7B above, will be included in the base coverage from which any inflation index or other formula for increased coverage is calculated, and any increased coverage under such an inflation or other rider will be calculated as though the enhancement had been in effect ab initio;

H. Any member of the Class wishing to avail himself of the provisions of Paragraph 7C may be required to establish eligibility for such a benefit by a sworn statement under penalty of perjury and by such other proof or eligibility as the defendant issuing the policy may reasonably deem necessary.

I. A class member shall be eligible for the benefit provided for in Paragraph 7C once for each policy of title insurance he purchased during the class period; but such benefits may not be aggregated. For example, if a class member purchased two policies during the class period and is otherwise entitled to take advantage of the provisions of Paragraph 7C, he is entitled ot receive the last $5,000 of coverage without charge on each of two new policies purchased from any defendant; but he is not entitled to receive the last $10,000 of coverage without charge on the purchase of one new policy from a defendant.

8. Subject to the provisions of Paragraph 9 of this Final Order and Judgment, all claims that plaintiffs and members of the class may have as against defendants, their respective parents, subsidiaries, affiliates, agents, officers, directors and employees, arising under the laws of the United States or of any state or other jurisdiction

that are based on, relate to or arise out of any allegations that any of them agreed or conspired to fix, raise, maintain, stabilize, or otherwise affect the prices of title insurance, including title search and examination and/or settlement services, are dismissed with prejudice; and in addition, each of the complaints filed herein is dismissed with prejudice.

9. Any and all claims by any member of the class against any title insurance underwriter other than the defendants and their respective parents, subsidiaries, affiliates, agents, officers, directors and employees, are not dismissed and shall survive the settlement and this Final Order and Judgment. Neither this Final Order and Judgment nor the fact of this settlement with defendants shall be construed to affect, in any manner whatsoever, any liability (whether individual, joint or several) of any title insurance underwriter or any other person or entity other than the defendants and their respective parents, subsidiaries, affiliates, agents, officers, directors and employees, any putative common law rule or practice, or state or local statute, to the contrary notwithstanding.

10. Without affecting the finality of this judgment in any way, this Court retains jurisdiction over the parties and action for the purposes of construing, enforcing, or effectuating any orders entered pursuant to the Settlement Agreement dated January 8, 1986, or this Final Order and Judgment; and it is further

ORDERED that in accordance with the Court's findings herein, the clerk of the Court is directed to enter final judgment pursuant to Fed.R.Civ.P. 58.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-1450

In Re: REAL ESTATE TITLE AND SETTLEMENT SERVICES ANTITRUST LITIGATION

STATE OF ARIZONA, APPELLANT

[815 F.2d 695]

Appeal from the United States District Court
For the Eastern District of Pennsylvania
(Civil Action No. MDL-633)
District Judge: Honorable Donald W. VanArtsdalen

Argued February 11, 1987
Before: Higginbotham and Stapleton, Circuit Judges
and Rodriguez, District Judge

JUDGMENT ORDER

After consideration of the contentions raised by appellant, it is ORDERED AND ADJUDGED that the district court's Final Order and Judgment of June 10, 1986 be and is hereby affirmed.

Costs taxed against appellant.

Dated: March 3, 1987

By the Court,

/s/ Walter K. Stapleton,
Circuit Judge

Attest:
/s/ Sally Mrvos, Clerk

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1987

ARIZONA,
Petitioner

v.

CHICAGO TITLE INSURANCE COMPANY, ET AL.,
Respondents

[485 U.S. 909]

No. 86-1963

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit
[decision below reported at 815 F.2d 695]

ORDER

The petition for writ of certiorari is denied. Justice White would grant certiorari. Justice Stevens took no part in the consideration or decision of this petition.

February 29, 1988

Attest:

/s/ Joseph F. Spaniol, Jr., Clerk

FEDERAL RULES OF CIVIL PROCEDURE

Rule 23. Class Actions

(a) PREREQUISITES TO A CLASS ACTION. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) CLASS ACTIONS MAINTAINABLE. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate

over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) DETERMINATION BY ORDER WHETHER CLASS ACTION TO BE MAINTAINED; NOTICE; JUDGMENT; ACTIONS CONDUCTED PARTIALLY AS CLASS ACTIONS.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The

judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) ORDERS IN CONDUCT OF ACTIONS. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) DISMISSAL OR COMPROMISE. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

SUBSIDIARIES (except Wholly-owned Subsidiaries) OF STEWART TITLE GUARANTY COMPANY

American Surveying of New England
Associated Abstract Agency, Inc.
Baca Landata, Inc.
Backman-Stewart Title Services, Ltd.
Blaine County Title Associates
Citizens Title & Trust
Fleetwood Management Corporation
Island Title Corporation
Island Title Exchange, Inc.
Landata, Inc. of Illinois
Landata, Inc. of the Midwest
Nacogdoches Abstract & Title Company
O'Rourke Title Company
Peoples Title Agency, Inc.
Potomac Title & Escrow
SIT Investment Corporation
Stewart Escrow & Title Services of Lawton
Stewart-Fidelity Title Company
Stewart Holding Company
Stewart-Princeton Abstract Company
Stewart River City Title, Inc.
Stewart Tax Service
Stewart Title (Glendale)
Stewart Title Agency of Bergen County
Stewart Title Agency of Ohio, Inc.
Stewart Title and Escrow, Inc.
Stewart Title & Settlement Services, Inc.
Stewart Title & Trust of Phoenix, Inc.
Stewart Title & Trust of Tucson
Stewart Title Company of Contra Costa
Stewart Title Company of Minnesota
Stewart Title Delaware, Inc.
Stewart Title of Aspen, Inc.
Stewart Title of Boulder County
Stewart Title of Central Nevada

Stewart Title of Clearwater, Inc.
Stewart Title of Eagle County
Stewart Title of Fort Myers, Inc.
Stewart Title of Fresno County
Stewart Title of Glenwood Springs, Inc.
Stewart Title of Hampton Roads, Inc.
Stewart Title of Larimer County
Stewart Title of Lubbock, Inc.
Stewart Title of Modesto
Stewart Title of Monterey County
Stewart Title of Montgomery County, Inc.
Stewart Title of Nevada
Stewart Title of Northern Nevada
Stewart Title of Oregon, Inc.
Stewart Title of Pennsylvania, Inc.
Stewart Title of Rhode Island, Inc.
Stewart Title of Rockport, Inc.
Stewart Title of San Patricio County, Inc.
Stewart Title of Santa Barbara (A division of Stewart Title of Fresno County)
Stewart Title of Sarasota
Stewart Title of Tampa
Stewart Title Orange County
Texarkana Title & Abstract Co., Inc.
Unique Exchange, Inc.